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CIVIL DOCKET

UNITED STATES DISTRICT COURT

WC7053-K
JUDGE COLEMAN
JUDGE SMITH

Title of Case

Delores Norwood, by her father Calvin Norwood; Van Siggers, by his Mother Floy Gates Siggers; Audrey Shanda Woodward, by her father Henry King Woodward; Andrew Galloway, by his mother Gertrude Galloway Plaintiff

v.

D. L. Harrison, Sr., Jim C. Barnett, Irene Breland, Garvin Johnston, as members of the Mississippi State Textbook Purchasing Board; John Bell Williams, as ex-officio chairman of the Mississippi State Textbook Purchasing Board and M. A. Snowden, as Executive Secretary of the Mississippi State Textbook Purchasing Board

Attys. (Defendant)
Honorable Stovall Lowery 202 Coahoma Bank Building Clarksdale, Miss. 38614—Atty. for Mrs. L. Wright Prin. of Clarksdale Baptist School

Honorable Elzy Smith 123 Court Street, Clarksdale, Miss. —Atty. for Norman E. Harper, Head master of Presby. Day School

Honorable Tom Ross, Bobo Ins. Bldg., Clarksdale, Miss.— Atty. for Mrs. George Bounds, Prin. of St. George's Espic. Day School

Honorable William Luckett, P.O. Drawer 119, Jackson, Mississippi 39205, Atty. for Sister Eliz. J. Fracchia, Prin. of St. Elizabeth School

Hon. Semmes Luckett, Atty. at Law, Clarksdale, Miss. Atty. for Gene L. Barbour, Principal of Lee Academy & Rebecca H. Walton, Principal of Lula-Rich Academy

Attorneys

For plaintiff:

Hon. Melvyn R. Leventhal, Hon. Fred L. Bank, Hon. Reuben V. Anderson, Hon. John A. Nichols, Hon. 538½ North Farish Street, Jackson, Mississippi 39202

Hon. Robert J. Kelly
113 Wood Street
Batesville, Mississippi 38606

Hon. Jack Greenberg, Hon. Norman Chachkin
Suite 2030
10 Columbus Circle
New York, New York 10019

For defendant:

Hon. Jesse R. Adams, Jr., Spec. Asst. Atty. Gen., Dept. of Justice, Office of the Attorney General, Jackson, Miss. 39205

Hon. Harvey S. Buck, 203 Jordan Ave., P.O. Box 514, West Point, Miss. 39773—Atty., for Frank Chiles, Headmaster, Oak Hill Academy

Hon. Taylor B. Smith, 215 Fifth St., Box No. 1366, Columbus, Miss. 39701 —Atty. for East Lowndes Educ. Foundation, Inc., G.T. Buckley

Hon. Wm. R. Bradley, P.O. Box 488, Clarksdale, Miss. 38614, Atty. for United Methodist School Principal, Mrs. Betty Cantwell

Hon. Frank K. Odom, P.O. Box 1218, Greenwood, Mississippi 38930—for Greenwood Private Jr. High School

Hon.s Lott, Sanders & Gwin, P.O. Box 1176, Greenwood, Miss. 38930—for B. Taylor, Carroll Academy

Hon.s Fraiser & Burgoon, P.O. Box 391, Greenwood, Miss. —for Seth Dillon, Pillow Academy, Greenwood, Miss.

Hon. P. J. Townsend, Jr., Townsend & McWilliams, Drew, Miss. 38737—for North-Sunflower County Foundation,

Hon. William Ward, Box 59, Starkville, Miss. 39759—for Starkville Academy

Date	Proceedings
10-13-70	Filed Complaint. Issued Summons, handed same to Marshal. Notice of Judge Keady's assignment to case mailed to counsel. A-0 78 to Courtroom Deputy.
10-14-70	Filed Motion for Leave to File Request for Admissions—copy to Law Clerk.
10-28-70	Filed Process of Summons by Marshal's return —exec.—D.L. Harrison, Sr., Calhoun City, Has Filed Process of Summons by Marshal's return —exec.—the following at Jackson, Miss. Miss Irene Breland, Garvin Johnston, M.A. Snowden, and Gov. John Bell Williams. Filed Process of Summons by Marshal's return —exec.—Jim C. Barnett, Gulfport, Miss.
10-30-70	Filed Motion for Leave to Take Deposition Upon Oral Examination. Copy to Law Clerk.
11-3-70	Filed Notice of Motion—copy to Law Clerk.
11-5-70	Filed Answer of Defendants. Copy to Law Clerk.
11-17-70	Filed Notice of Withdrawal of Motion for leave to take Deposition Upon Oral Examination dated Oct. 29, 1970 under Rule 30. Copy to Law Clerk.
11-19-70	Entered Order signed by Judge Keady on 11-18-70, sustaining Motion for leave to file Request for Admissions, has been entered in Civil Order Book 20, pages 34 & 35. Notices sent to attorneys. Filed Request For Admissions.
11-27-70	Filed Response to Request for Admissions.
11-30-70	Filed Notice of Motion. Filed Motion to Convene a Three Judge District Court—copy to Law Clerk.
12-14-70	Filed Notice of Deposition Upon Oral Examination Copy to Law Clerk.
12-21-70	Filed and entered Order signed by Hon. John Brown, Chief Judge, designating Judge James P. Coleman and Judge Orma R. Smith to serve with Judge Keady, to hear and determine the Action. C. O. B. 20, pages 91 & 92. Copies of and Notices mailed to Counsel. Sent Copy to Complaint and Answer to Judge Coleman and Jud Smith. (Letter dated 12-16-70-received this date) Placed pleadings, sent with Order, in jacket file.

12-23-70	Placed letter in jacket file to Attorneys from Law Clerk requiring counsel to submit by Jan. 22, 1971, a stipulation.
	Placed letter in jacket file from Judge Keady to other two Judges Coleman and Smith, stating he was mailing each one a copy of everything in the above file.
1-25-71	Filed Deposition of Marshall Allen Snowden with attachments enclosed.
1-26-71	Placed letter in jacket file from Law Clerk to Attorney notifying him that he has until Feb. 4, 1971 to file stipulation of uncontradicted facts which court has ordered counsel to submit. (Leventhal—Attorney)
2-1-71	Filed Motion For Accounting and Notice of Motion. Copy to Law Clerk.
2-4-71	Filed Motion To Compel Answers To Request For Admissions Or In The Alternative Motion To Supplement The Record. Copy to Law Clerk. Mailed File to Greenville.
2-4-71	Placed letter in jacket file From Law Clerk (Hailman) to Attys/notifying them that a hearing will be held on all motions pending at 10 A. M. on Mon., Feb. 22, in Greenville
2-5-71	Filed Stipulation: Constested and Uncontested Issues of Fact and Law; Filed copy of each of the twenty stipulations entered into by parties. Copies sent to Judges, and Jesse R. Jr. Esquire
2-8-71	Filed Motion to Compel Defendants to Compile Date—copies to Judges by Attorney.
2-12-71	Placed letter in jacket file from Judge Keady to Attorneys setting conference with counsel for Feb. 22 following argument on Motions.
2-16-71	Filed Motion For Leave To Supplement The Record.
	Filed Notice Of Motion. Copy to Law Clerk.
2-23-71	Placed Courtroom Deputy Sheet in jacket file—that hearing on 4 Motions be sustained.
2-25-71	Filed Stipulation #21—copies to Law Clerks (Hailman & Dodson)

3-1-71	Entered Order signed by Judge Keady on 3-1-71, granting Plaintiff's Motion for Accounting, Motion to Compel Deft's. to Compile Data, Motion for Leave to Supplement the and Motion to Compel Answers to Request for Admissions or in the Alternative Motion to Sup the Record, has been entered in Civil Order 20, pages 167-170. Copy of Order sent to Counsel Notice of Entry Mailed.
3-4-71	Filed Deposition of Arthur Choate
	Filed Deposition of Delbert Ronald Coggins
	Filed Deposition of Glenn A. Cain
	Filed Deposition of Bernice Lowe and Joseph Emmett Logan
	Filed Deposition of William DeWitt Mosely
	Filed Deposition of D.B. Floyd
	Filed Deposition of Billy E. Daniels
	Filed Deposition of Bernard Waites
	Filed Deposition of Jimmy H. Isbell
3-5-71	Filed the following copies of depositions on the following: W.E. Boggan, John E. Collier, Lamar Fortenberry, Donald Hopper, Holace Morris, George F. Pettey, Carl Franklin Drake, Reverend Melvin R. Porter, Franklin Haire, Preston M. Cochran, Thomas H. Blakeney, A.E. McGahey, James Franklin Hughes, John O. Ethridge, James D. Stoddard, Alton Rogers Zachary.
3-11-71	Filed Deposition of Billye G. Dendy.
	Filed Deposition of Alton Roger Zachary
	Filed Deposition of Alton Roger Zachary
	Filed Deposition of Dr. James D. Gilbert
	Filed Deposition of M. E. Rhodes
	Filed Deposition of Diane Douglas Tanksley
	Filed Deposition of James Arthur Nowell
	Filed Deposition of Harry Eugene Horne
	Filed Deposition of John E. Manor
	Filed Deposition of Lawrence W. Owens
	Filed Deposition of Joe Sheppard
	Fied Deposition of David C. White
	Filed Deposition of Vivian M. Hood
	Filed Deposition of Henry A. Trotter

Filed Deposition of Mrs. Mava Taylor
Filed Deposition of Earl W. Edwards
Filed Deposition of Dewitt A. Dixon
Filed Deposition of William J. Simmons
Copies also sent to Judges.

3-15-71 Filed Notice of Depositions Upon Oral Examination. Deposition Subpoena To Testify or Produce documents ot Things Attached.

3-16-71 Placed letter in jacket file from Leventhal to U. S. Marshal, John H. Phillips and Mr. Garald K. Baldwin concerning change of date upon which the witnesses are to appear.

3-17-71 Filed Notice of Deposition upon Oral Examination—copy to Law Clerk.

3-23-71 Filed Motion to Quash Subpoena Duces Tecum on the following: Mrs. Betty Cantwell, Gene L. Barbour, and Rebecca H. Walton.

3-24-71 Filed Motion To Quash Subpoena Duces Tecum. Copy to Law Clerk.

3-22-71 Filed Motion to Quash Subpoena Duces Tecum (Mrs. George Bounds) copy already mailed to Law Clerk.

3-25-71 Filed Motion to Quash Subpoena Duces Tecum (Mrs. LaVenna Wright)—copy to Law Clerk.
Filed Copy of Motion to Quash Subpoena Duces Tecum (Norman E. Harper) original already mailed to Law Clerk. (with attachments attached).

3-25-71 Filed Stipulation #22. Copy to Law Clerk.

3-25-71 Filed Motion To Quash Subpoena Duces Tecum.

3-25-71 (Filed by J. Trawick, Clarksdale) on 24th. Copy mailed to Judge Keady.

3-25-71 Filed USM285 with Returns that Subpoena & Notice of Deposition were served on the following: Saint Elizabeth Catholic School by Sister Elizabeth Jean, First Presbyterian Day School by Dr. Norman Harper; First United Methodist School by Mrs. Cantwell; Lula Rich Academy by Rebecca H. Walton; St. George's Episcopal Day School by Mrs. George Bounds/; Gene L. Barbour, Principal, Lee Academy; Mrs. LaVenna Wright, Clarksdale Baptist School; Principal,

Happy Day School; Principal, Lula Rich Junior High School; all served on 3-15-71.

3-26-71 Filed Summary of Stipulations Entered By The Parties. Copy to Law Clerk.

3-26-71 Entered Order signed by Judge Keady on 3-24-71, Order Postponing Deposition of Norman E in Civil Order Book 20, pages 219 & 220. Copy of Order has been sent to Counsel. Notice of Entry Mailed.

4-2-71 Filed Motion to Appoint Court Reporters Filed Notice of Motion—copies of above to Law Clerk.

4-5-71 Filed Notice of Depositions Upon Oral Examination. Copy to Law Clerk.

4-6-71 Entered Order signed by Judge Keady on 4-5-71, Appointing Persons To Administer Oaths appointing Elizabeth Evans and Nancy West as officers authorized to administer oaths and take testimony of persons whose depositions have been or will be noticed, in Civil Order Book 20, page 227. Copy of the Order has been sent to Counsel. Notices of entry mailed.

4-15-71 Filed Motion to Quash or in the Alternative for Protective Order—copy to Judge by Attorney. Filed Motion to Quash Subpoena Duces Tecum —copy to Law Clerk.

4-15-71 Filed Process of Deposition Subpoena To Testify or Produce Documents or Things exec. Headmaster of M & L Academy at Nettleton, Miss. on 4-12-71 Served Michael R. Garrett (Bennett DUSM)

4-15-71 Filed Process of Deposition Subpoena To Testify Or Produce Documents of Things by Marshals Return exec. Headmaster, Chickasaw Academy at Van Fleet, Mississippi, Howard C. Bowles on 4-12-71, Bennett DUSM.

4-15-71 Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Principal, North Mississippi Academy (Calvary Baptist Church) Mrs. Tom C. Stewart, on 4-15-71. Williams DUSM

4-16-71 Filed Process of Deposition Subpoena To Tes-

tify or Produce Documents or Things by Marshal's Return exec. Principal, Montgomery- Carroll Academy, Marion L. Branch, on 4-15-71. (Jones, DUSM) (Winona, Miss.)

4-16-71 Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Principal of Kirk Academy, Allen R. Smithers, on 4-15-71 at Grenada, Miss., (Jones, DUSM)

4-16-71 Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Principal of Grenada Lake Academy, William C. Jaudon, on 4-15-71 at Gore Springs, Mississippi. (Jones, DUSM)

4-16-71 Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Headmaster, Calhoun Academy, Mrs. Jeanett S. Mayhan, on 4-15-71 at Calhoun City, Mississippi. (Jones, DUSM)

4-16-71 Entered—Order signed by Judge Keady on 4-15-71, ordering that deposition subpoena noticed by Plaintiffs for April 20, 1971 at Aberdeen is stayed pending a consolidated hearing by the Court of numerous identical motions to quash depositions filed by officials of other private schools situated. Counsel will be given notice in the future of the time date & Place of hearing; in Civil Order Book 20, page 240 Copy of Order has been sent to Counsel. Notice of entry mailed.

4-16-71 Filed Process of Subpoena by Marshal's Return exec. HeadMaster, Starkville Academy Don Johnson on 4-13-71 at Starkville, Miss. (Phillips U.S.M.)

4-16-71 Filed Process of Subpoena by Marshal's Return exec. Principal We Care Academy, Faye Brant on 4-13-71 at Kosciusko, Miss. (Phillips USM)

Filed Process of Subpoena by Marshal's Return exec. Headmaster, Winston Academy, M. G. Turner, on 4-13-71 at Louisville, Miss. (Phillips U.S.M.)

Filed Process of Subpoena by Marshal's Return exec. Principal, French Camp, Miss. Sam Allan,

on 4-13-71 at French Camp, Miss. (Phillips USM)

Filed Process of Subpoena by Marshal's Return exec. Principle, Ministerial High School West Point, Miss. (William Robbins), on 4-12-71. (Phillips USM)

Filed Process of Subpoena by Marshal's Return exec. Principal Oak Hill Academy, Frank Chiles, on 4-12-71 at West Point, Miss. (Phillips USM)

Filed Process of Subpoena by Marshal's Return exec. HeadMaster, Pheba Academy, Mrs. Sarah Jackson, on 4-12-71 at Pheba, Miss. (Phillips USM)

Filed Process of Subpoena by Marshal's Return exec. Headmaster, East Lowndes Academy G. T. Buckley, on 4-12-71 at Steens, Mississippi. (Phillips USM)

4-19-71 Entered Order signed by Judge Keady on 4-16-71, ordering that the deposition and subpoena production of documents noticed by Plaintiffs for Mon. April 19, 1971 at 4 p.m. at Aberdeen, Miss. is stayed pending a consolidation hearing by Court of numerous identical to quash depositions filed by officials of other private schools similarly situated. Counsel will be given notice of time, date and place of hearing, in Civil Order Book 20, page 242. Copy of order has been sent to Counsel. Notice of entry mailed.

4-20-71 Filed Motion To Quash or in the Alternative For Protective Order. Copy to Law Clerk.

4-20-71 Filed Process of Deposition Subpoena To Testify or Produce Documents of Things by Marshal's Return exec. Headmaster of College Hill Academy, Mr. Adkins on 4-20-71 at Oxford, Miss. (DUSM Williams)

4-20-71 Filed Motion to Quash or in the Alternative for Protective Order—copy to Law Clerk.

4-21-71 Filed Motion To Quash Subpoena. (Mrs. Stewart, North Mississippi Academy) with Affidavit attached. Filed Notice of Motion. Copy to Law Clerk.

4-21-71 Filed Motion To Quash or in the Alternative For Protective Order. Copy to Law Clerk.

4-21-71 Filed Process of Deposition subpoena to testify or produce Documents or Things by Marshal return exec. Principal, Paynes Academy, Charleston, Miss. on 4-20-71. (Hasting DUSM)

Filed Process of Deposition Subpoena To Testify or Produce Documents or Thing by Marshal's Return exec. Principal, West Tallahatchie Academy, Summer, Miss. on 4-19 (Hasting, DUSM)

Filed Process of Deposition Supbpoena To Testify or Produce Documents or Things by Marshal's Return exec. Headmaster, Bayou Academy, Skene, Mississippi on 4-19-71. (Hasting,

Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Principal, North Central Mississippi Schools, (Enid Academy) Enid, Mississippi on 4-20-71. (Hasting, DUSM)

Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Principal First Baptist Parochial, Batesville, Miss. on 4-20-71 (Hasting, DUSM)

Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Principal, Presbyterian Day School, Cleveland, Miss. on 4-16-71. (Hasting, DUSM)

Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Headmaster, West Panola Schools, Inc., Batesville, Miss. on 4-20-71. (Hasting, DUSM)

Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Principal Duncan Academy, Duncan, Miss. on 4-19-71 (Hasting DUSM)

4-22-71 Filed Motion To Quash Subpoena Duces Tecum in behalf of Mrs. Weems, Principal of Paynes

Academy, Charleston, Miss. Sent copy of motion to Hon. Levanthal and Hon. Judge Keady.

4-22-71 Filed Motion To Quash Subpoena Duces Tecum in behalf Lamar Leggett, Principal of West Tallahatchie Academy, Summner, Miss. Attorney mailed copy of Motion to Hon. Levanthal and to Hon. Judge Keady.

4-22-71 Entered Order signed by Judge Keady on 4-21-71, ordering that taking of certain deposition and subpoena issued pursuant thereto directed to Greg Adkins is hereby stayed until further order of this court, in Civil Order book 20, page 245. Copy sent to Counsel. Notice of entry mailed.

4-22-71 Filed USM-285 (Marshals Form) of Deposition Subpoena To Testify Or Produce Documents or Things with return unexecuted Principal, Lighthouse Christian Academy, Olive Branch, Miss. Notice of Depositions Upon Oral Examination attached.

4-22-71 Filed Process of Deposition subpoena To Testify or Produce Documents or Things by Marshals return exec. Headmaster, Northwest Academy, Arkabutla, Miss. on 4-21-71. (Hasting, DUSM)

Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's return exec. Principal, Highway Baptist Parochial Academy, Southhaven, Miss. on 4-21-71(?) (Hasting, DUSM)

Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Headmaster, Magnolia Heights Schools, Senatobia, Miss. on 4-21-71. (Hastings, DUSM)

Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Headmaster, Hillcrest Academy on 4-21-71. (Hasting, DUSM)

4-22-71 Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Headmaster, Leland Academy, Leland, Miss. on 4-21-71. (Baldwin DUSM)

Filed Process of Deposition Subpoena To Testify

or Produce Documents or Things by Marshals Return exec. Headmaster, Washington School, Greenville, Miss. on 4-21-71 (Baldwin DUSM)

4-26-71 Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Principal, Carroll Academy, Carrollton, Mississippi on 4-23-71. (Hasting, DUSM)

Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Principal, Greenwood Private Jr. High School, Greenwood, Miss. on 4-23-71. (Hasting, DUSM)

Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Principal, Pillow Academy, Greenwood, Mississippi on 4-23-71. (Hasting, DUSM)

4-26-71 Filed Motion For Order That Deposition Not Be Taken on behalf of Bernard Taylor, Principal of Carroll Academy, with attachments. Copy to Law Clerk.

Filed Motion To Quash Subpoena on behalf of Bernard Taylor with Affidavit and attachments. Copy to Law Clerk.

Filed Motion To Quash Subpoena on behalf of Seth Dillon, Principal of Pillow Academy. Copy to Law Clerk.

Filed Motion For Order That Deposition Not Be Taken on behalf of Seth Dillon, Pillow Academy. Copy to Law Clerk.

4-26-71 Filed Motion For Order That Deposition Not Be Taken on behalf of Robert Leon Holly, Principal of Greenwood, Private Jr. High School. Copy to Law Clerk.

Filed Motion To Quash Subpoena on behalf of Robert Leon Holly, Principal of Greenwood, Private Jr. High School. Copy to Law Clerk.

4-27-71 Filed Motion To Quash Subpoena Duces Tecum on behalf of Joe Thomas, Headmaster of North Sunflower County Foundation, Inc. Copy to Law Clerk.

Filed Motion To Quash Subpoena Duces Tecum on behalf of Joe Thomas, Headmaster of North

Sunflower County Foundation, Inc. Copy to Law Clerk.

4-27-71 Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return exec. Principal, Greenville Christian Day School, Greenville, Miss. on 4-26-71, (Hasting, DUSM)

4-27-71 Filed Process of deposition Subpoena To Testify or Produce Documents or Things by Marshals' Return exec. Headmaster, North Sunflower Academy, Ruleville, Mis. on 4-26-71 (Hasting, DUSM)

4-27-71 Filed Process of Deposition Subpoena To Testify or Produce Documents or Things by Marshal's Return Headmaster, Central Delta Academy, Inverness Baptist Church on 4-26-71. Returned *Unexecuted*, Could not locate school. (Hasting, DUSM)

4-28-71 Filed Motion To Quash Subpoena Duces Tecum on behalf of Don Johnson, Starkville Academy. Copy to Law Clerk.

5-11-71 Placed Notice of Hearing on Pending Motions To Quash Depositions in jacket file. Mailed to Counsel Concerned. (Positively No Continuance)

5-13-71 Entered Order signed by Judge Keady on 5-12-71, ordering that William O. Luckett have permission to withdraw as said counsel for Sister Elizabeth Jean Fracchia, Principal of St. Elizabeth School. Mailed Copy to Hon. Leventhal. Notice of Entry Mailed. COB 20, page 261.

5-17-71 Filed Motion To Quash Subpoena Duces Tecum. Copy to Law Clerk.

Filed Notice of Motion.

5-21-71 Entered Order, signed by Judge Smith on 5-20-71, staying notices and subpoenas to compel private sch. officials to appear and be deposed outside the county of their residence and schools; representatives of private schools have to May 30, 1971 to file affidavits, in COB 20, page 273-274. Notice mailed to counsel.

5-21-71 Placed Courtroom sheet in jacket file—Hearing on 5-19-71.

5-24-71 Filed Motion For Preliminary Injunction—Mailed copy to law clerk.

5-25-71 Filed Amended Notice of Depositions Upon Oral Examination. Copy to Law Clerk.

5-28-71 Filed Motion To Quash Subpoena, Hon. Andreq K. Naugle, III Atty. for Pheba Academy, West Copy to Law Clerk.

6-1-71 Placed letter in jacket file to Attys. from John Hailman, Law Clerk to Judge Keady informing them that case has been firmly set for final hearing before 3-Judge Court at 10:00 A. M., July 9, 1971 in Greenville, Miss.

5-27-71 Received in Clarksdale—letter from Brunini, Everett, Grantham & Quin stating that they represent Sister Elizabeth Jean Fracchia, Principal of St. Elizabeth School.

6-4-71 Filed Amended Notice of Depositions Upon Oral Examination. (Melvyn R. Leventhal) Copy to Law Clerk.

6-4-71 Filed Second Motion To Quash Subpoena Duces Tecum. (Gene L. Barbour, Principal of Lee Academy, Clarksdale, Miss.)
Filed Second Motion To Quash Subpoena Duces Tecum, (Rebecca H. Walton, Principal of Lula, Mississippi) Copies mailed to Francis by J. Trawick, Clarksdale, Miss.)

6-11-71 *Filed Motion To Dismiss & Response to Order filed by the Internal Revenue Service in connection with Green V. Kennedy, No. 1355-69, D.C. on Sept. 30, 1970 & Aug. 21, 1970
*(certified copy of above) Copies have been sent to all 3 three judges by Leventhal.

6-14-71 Filed Additional Deposition taken by the United States in Connection with Coffey v. State Educational Finance Commission. Civil Action No. 3906. (Loretta Turner, Theodore Prevost, Luther W. Tanner, Mrs. Robert Morton, Barbara Creekmore, Ecr.
John Andrew, Dr. Gus A. Bynum, Burnice W. Smith, Harry L. Marsalis, Harold A. Thompson, Medford Evans, William Simmons, Louis W.

Hollis, Richard Morphew, Mrs. Eloise Alderman and etc.

6-16-71 Filed Deposition of Lloyd R. Henderson, Ph.D. Placed exhibits in file 1-16.

6-17-71 Filed Depositions of Officers of the following schools in connection with Coffey V. State Educational Finance Commission, Civil Action No. 3906: North Delta School, Inc., County Day School, Jackson, Academy, South Side Academy, Vicksburg Academy (Citizens Educational Foundation), South West Academy, Lamar School Foundation, Cruger-Tchula Academy, Canton Academy, Indianola Educational Foundation, East Holmes Academy.

6-23-71 Filed depositions taken by the United States in connection with Coffey V. State Educational Finance Commission, No. 3906: Jefferson Davis Academy, Columbus Educational Foundation, Deer Creek Educa. Institute, Inc., Harrison County Private School, Sharkey-Issaquenna Lula-Rich Educational Foundation, Inc.

6-30-71 Mailed File to Greenville.

7-1-71 Filed Depositions of the following:
Janette Mayhan, Frank Alvin Weeks, Norman McKenzie, Jr., Thomas Spight, Joe Thomas, Bernard Taylor, Howard C. Bowles, Jamie W. Howell, A. R. Smithers, H. D. Graham, William C. Jaudon, Jr., Charles (Brownie Tohill, Harvey S. Jackson, A. L. Minor, Phoebe Stewart, Doug Herring. (Mailed to Greenville, Miss.)

7-7-71 Filed Deposition of M. A. Snowden. (Filed in Greenville by M. Guyton)

7-8-71 Filed Stipulation entered into between the parties. Copy to Judge's Smith's Law Clerk, original to Greenville where file is.

7-9-71 Placed letter in jacket file from Hon. William R. Lamb, Oxford, Miss. to Hon. M. Leventhal informing him that the information submitted in the letter is an alternative to the taking of the deposition of Greg Atkins, former Headmaster of College Hill Academy, Oxford, Miss.

7-12-71 Filed Deposition of Michael R. Garrett.
Filed Deposition of Anne Windham.

7-13-71 Filed Deposition of Matthew G. Turner. (mailed to Greenville)

7-19-71 Filed Motion and Notice of Motion. Copy to Law Clerk.

7-20-71 Entered Order signed by Judge Smith on 7-19-71, ordering Plaintiffs may prepare a Reply Brief, to be transmitted to each member of the Court no later than July 30, 1971, in Civil Order Book 20, page 317. Copies of Order have been sent to Counsel & Notice of Entry mailed. Mailed to Greenville to be placed in file.

7-23-71 Filed Deposition of Robert Leon Holly.; of Greenwood, Miss.
Filed Deposition of Don Johnson of Starkville, Miss.
Filed Deposition of Norman E. Harper, of Clarksdale, Miss.
Filed Deposition of Seth O. Dillion of Greenwood, Miss. Mailed to Greenville.

7-21-71 Filed Deposition of John Shearer, of the Shaw Educational Foundation and the Bayou Academy.
Filed Deposition of Lamar Leggett of Tutwiler, Miss.
Filed Deposition of Mrs. Ivy Weems, Tippo, Miss. Mailed to Greenville, Miss.

7-29-71 Filed Deposition of M. L. Branch of Winona, Miss.
Filed Deposition of LaVenna Tucker Wright of Clarksdale, Miss. Mailed above to Greenville.

8-3-71 Filed Deposition of Gene L. Barbour of Clarksdale, Miss.
Filed Deposition of Mrs. Rebecca H. Walton of Clarksdale, Miss.
Filed Deposition of Kathrine S. Wilson of Clarksdale, Miss.
Filed Deposition of Elizabeth P. Dean of Cleveland, Miss.

8-9-71 Filed Motion To Supplement The Record. Copy has been sent to Judges Concerned.

Filed Notice of Motion. Copy has been sent to the Judges concerned. Charts attached.

8-10-71 Entered Order signed by Judge Keady on 9-9-71; Ordered plaintiffs' post-trial motion to supplement the record be, and is sustained and the record accordingly supplemented, in Civil Order Book 21, page 11. Copy of Order has been sent to Judges Smith & Coleman & to Attorneys concerned. Notice of entry mailed.

8-23-71 Filed Deposition of Sam Allen, principal of French Camp Academy, with Accountants' Report attached.

9-3-71 Filed Oral Deposition of Mrs. Helen Bounds (St. George Episcopal Day School, Clarksdale, Miss.) with exhibits attached. (Mailed to Mrs. Guyton, Courtroom Deputy, Aberdeen, Miss.)

4-18-72 Filed Opinion Of The Court written by Judge Coleman.

Entered Judgment signed by Judge William C. Keady on 4-17-72 ordering: All relief sought by Plaintiffs be and the same is hereby denied and The Complaint is finally dismissed with prejudice. All costs are taxed to plaintiffs; in Civil Order Book 21, page 265. Copies of Judgment are being sent to Counsel concerned and Notice of Entry mailed. J. S. 6

5-11-72 Filed Motion For Leave To Supplement the Record. Copy to Law Clerk. Exhibits attached.

5-15-72 Entered Order signed by Judge Keady on 5-15-72 ordering that leave is hereby granted to plaintiffs to supplement and include in the record of this cause the four exhibits to which reference is made in their motion and the Clerk of this Court is directed to make such inclusion, in Civil Order Book 21, pg. 291. Copies of the order have been sent to persons concerned and Notice of Entry mailed.

5-16-72 Filed Notice of Appeal to the Fifth Circuit. Copies to all concerned.

Filed Notice of Appeal to the Supreme Court of the United States. Copies to all concerned.

5-17-72	Mailed Certified copies of Judgment and "Opinion of The Court" to the Fifth Circuit; Court of Appeals as requested and also certified copies of docket sheets and copy of letter from Hon. M. Leventhal explaining how he wants appeal handled.
5-19-72	Mailed copy of Notice of Appeal and Courtroom Deputy Sheet to Mr. Milton Cook, Court Reporter when hearings in above case were heard.
6-1-72	Filed transcript of proceedings had on 7-9-71 at 10 a.m. in Greenville before Judges Coleman, Smith & Keady. (J. Kelley)
6-23-72	Mailed original record to Supreme Court of the United States.
7-3-72	Filed Motion to Stay Proceedings on Appeal and for Retention of Record in the District Court. (copy from U.S. Court of Appeals filed 6-23-72) Filed letter from Court of Appeals that Motion had been Granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

Northern District of Mississippi,
Filed Oct. 9, 1970, William T. Robertson, *Clerk*,
By [illegible], *Deputy*

DELORES NORWOOD, by her father CALVIN NORWOOD; VAN SIGGERS, by his mother FLOY GATES SIGGERS; AUDREY SHANDA WOODARD, by her father HENRY KING WOODARD; ANDREW GALLOWAY, by his mother GERTRUDE GALLOWAY,

PLAINTIFFS,

v.

D. L. HARRISON, SR., JIM C. BARNETT, IRENE BRELAND, GARVIN JOHNSTON, as members of the Mississippi State Textbook Purchasing Board; JOHN BELL WILLIAMS, as ex-officio chairman of the Mississippi State Textbook Purchasing Board and M. A. SNOWDEN, as Executive Secretary of the Mississippi State Textbook Purchasing Board,

DEFENDANTS.

Civil Action
No. WC7053-K

COMPLAINT

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343(3) and (4). This is a suit in equity authorized by 42 U.S.C. § 1983, which seeks to redress the deprivation of rights assured and protected by the Fourteenth Amendment to the Constitution of the United States.

2. Plaintiffs seek a temporary restraining order and preliminary and permanent injunctions enjoining defendants from providing, or permitting the distribution or sale of, state purchased and owned textbooks to private racially segregated schools and academies.

3. The named plaintiffs herein, Delores Norwood, Van Siggers, Audrey Shanda Woodard and Andrew Galloway are black citizens of the United States residing in Tunica County, Mississippi. They are students in attendance at the public schools of the Tunica County School District. Their right to a racially integrated and otherwise non discriminatory public school system, vindicated by order of this Court dated January 23, 1970 [*United States and Driver v. Tunica County School District*, Civil Action Nos. DC 6718 and 7013], and their right to the elimination of state support for racially segregated schools, has been frustrated and/or abridged by the creation of the racially segregated Tunica County Institute of Learning and the policies and practices of defendants as set forth below. The named plaintiffs are represented herein by their parents.

4. The named plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. They sue in their own behalf and in behalf of students throughout the state of Mississippi who are aggrieved by the policies and practices of defendants complained of herein. The members of the class on whose behalf plaintiffs sue are so numerous so as to make it impracticable to bring them all individually before the Court, but there are common questions of law and fact involved and common grievances arising out of common wrongs. A common relief is sought for plaintiffs and all members of the class. The plaintiffs fairly and adequately represent the interests of the class. The policies and practices of defendants complained of herein are applicable to the plaintiff class generally. Moreover, the questions of law and fact common to the members of the class predominate over any question affecting only individual members and a class action is superior to other available methods for adjudication of the controversy.

5. Defendants, members of the Mississippi State Textbook Purchasing Board (hereinafter the "Purchasing Board"), and their respective addresses are: D. L. Harrison, Sr., Calhoun City, Mississippi; Jim C. Barnett, Gulfport, Mississippi; Irene Breland, Jackson, Mississippi and Garvin Johnston, Jackson, Mississippi. Defendant John Bell Williams is Governor of the State of Mississippi and ex-officio chairman of the Purchasing Board.

6. Defendant M. A. Snowden is the executive secretary of the Purchasing Board. He maintains records and otherwise administers the Purchasing Board's programs and activities on a day to day basis.

7. Under the laws of the State of Mississippi, defendants select, purchase, distribute, loan and otherwise dispose of textbooks, in behalf of the State of Mississippi, for the use of children enrolled in the elementary and secondary schools in the State of Mississippi, (Miss. Code Anno. §§ 6634, *et. seq.*). Defendants have pursued and presently pursue the unlawful policies and practices complained of herein under the color of authority vested in them by the laws of the State of Mississippi and the rules and regulations promulgated pursuant thereto.

8. Beginning with the 1964-65 school year—when the first school districts in Mississippi were required to integrate under freedom of choice—and through the present, numerous private schools and academies have been either formed or enlarged, which schools have established as their objective and/or have had the effect of affording the white children of the State of Mississippi racially segregated elementary and secondary schools as an alternative to racially integrated and otherwise non-discriminatory public schools.

9. The defendants have provided these racially segregated schools and academies and the students attending such schools, either through sale or loan, textbooks purchased and owned by the State of Mississippi and have thereby provided state aid and encouragement to racially segregated education and have thereby impeded the establishment of racially integrated public schools in violation of plaintiffs' rights assured and protected by the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, plaintiffs respectfully pray that this Court:

1. Forthwith enter an order requiring an accounting by defendants of all textbooks purchased from the State of Mississippi or on loan from the State of Mississippi by private schools and/or the students enrolled therein;

2. Forthwith enter an order preliminarily enjoining defendants to immediately recall, and otherwise assure the return to state depositories, all textbooks owned by the State of Mississippi presently being used by students in attendance at private schools which have already been

adjudged by other United States Courts both in Mississippi and the District of Columbia as racially segregated and which have been formed to provide white students with an alternative to racially integrated and non-discriminatory public schools;

3. Forthwith enter an order preliminarily enjoining defendants from any further sale or distribution of state owned textbooks to any private school and/or students enrolled therein without first notifying plaintiffs herein and obtaining the approval of this Court;

4. Thereafter permanently enjoin defendants from distributing any state owned textbooks to any private school and/or students enrolled therein without first notifying plaintiffs and obtaining approval of this Court and without first establishing that the private school is racially integrated both as to students and faculty and has not had the effect of frustrating or impeding the establishment of racially integrated public schools.

5. Grant such additional or alternative relief as the Court deems just and equitable.

Respectfully submitted,

/s/ Melvyn R. Leventhal
Fred L. Banks
Reuben V. Anderson
John A. Nichols
538½ North Farish Street
Jackson, Mississippi 39202
Robert J. Kelly
113 Wood Street
Batesville, Mississippi 38606
Jack Greenberg
Norman Chachkin
Suite 2030
10 Columbus Circle
New York, New York 10019
Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DELORES NORWOOD, ET AL., PLAINTIFFS
v.
D. L. HARRISON, SR., ET AL., DEFENDANTS
Civil Action No. 70-53-K

ANSWER OF DEFENDANTS—Filed November 5, 1970

The Defendants in the above styled action, by and through their attorney, file herewith their Answer to the Complaint filed against them:

First Defense

This Court has no jurisdiction of the parties nor of the subject matter of this cause.

Second Defense

The Complaint fails to state a claim against these Defendants upon which relief can be granted.

Third Defense

Defendants herein have immunity from the action filed herein against them.

Fourth Defense

Further, in answer to the allegations of the Complaint:

(1)

Defendants deny the allegations of Paragraph 1 of the Complaint.

(2)

Defendants admit the allegations of Paragraph 2 of the Complaint.

(3)

Defendants deny the allegations of Paragraph 3 of the Complaint.

(4)

Defendants deny the allegations of Paragraph 4 of the Complaint.

(5)

Defendants admit the allegations of Paragraph 5 of the Complaint.

(6)

Defendants admit the allegations of Paragraph 6 of the Complaint.

(7)

Defendants deny the allegations of Paragraph 7 of the Complaint and would state that any statutes referred to therein speak for themselves.

(8)

Defendants deny the allegations of Paragraph 8 of the Complaint.

(9)

Defendants deny the allegations of Paragraph 9 of the Complaint.

Defendants deny that Plaintiffs are entitled to any relief in this action and pray that the action be dismissed at Plaintiffs' cost.

Respectfully submitted,

A. F. SUMMER, *Attorney General of the State of Mississippi*

WILLIAM A. ALLAIN, *Assistant Attorney General of the State of Mississippi*

JESSE R. ADAMS, JR.,
Special Assistant Attorney General
of the State of Mississippi
Attorneys for Defendants
/s/ by: JESSE R. ADAMS, JR.

CERTIFICATE
(omitted in printing)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

[Northern District of Mississippi, Filed Dec. 21, 1970,
William T. Robertson, *Clerk*,
By Helen P. Burnett, Deputy]

DELORES NORWOOD, by her father CALVIN HORWOOD: VAN SIGGERS, by his mother FLOY GATES SIGGERS: AUDREY SHADA WOODARD, by her father HENRY KING WOODARD: ANDREW GALLOWAY, by his mother GERTRUDE GALLOWAY,

PLAINTIFFS

VS.

D. L. HARRISON, SR., JIM C. BARNETT, IRENE BRELAND, BARVIN JOHNSTON, as members of Mississippi State Textbook Purchasing Board; JOHN BELL WILLIAMS, as ex-officio chairman of the Miss. State Textbook Purchasing Board and M. A. SNOWDEN, as Executive Secy. of the Miss. State Textbook Purchasing Board,

DEFENDANTS.

Civil Action
No. WC 7053-K
(1) Requesting Judge: Honorable WILLIAM C. KEADY
Northern District of Mississippi
(2) District Judge: Honorable ORMA R. SMITH
Northern District of Mississippi
(3) Circuit Judge: Honorable JAMES P. COLEMAN
(4) Date of Order: December 16, 1970

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined

by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate. See Jackson v. Choate, 5 Cir., 1968, 404 F.2d 910, Jackson v. Department of Public Welfare of the State of Florida, S.D. Fla., 1968, 296 F.Supp. 1341; City of Gainesville, Georgia v. Southern Railway Company, N.D. Ga., 1969, 296 F.Supp. 763; Smith v. Ladner, S.D. Miss., 1966, 260 F.Supp. 918; Hargrave v. McKinney, M.D. Fla., 1969, 302 F.2d 1381; Langford v. Barlow [No. 26770], 5 Cir., 1969, 417 F.2d 628, Langford v. Barlow, W.D. Tex., 1969, 304 F.Supp. 657;

/s/ JOHN R. BROWN
Chief Judge
Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DELORES NORWOOD, ET AL., PLAINTIFFS, v. D. L. HARRISON, SR., ET AL., DEFENDANTS.	Civil Action No. WC70-53-K (Three-Judge Court)

ORDER—filed March 1, 1971

Plaintiffs having filed Motion for Accounting, Motion to Compel Defendants to Compile Data, Motion for Leave to Supplement the Record and Motion to Compel Answers to Request for Admissions or in the Alternative Motion to Supplement the Record; and the Court having read, heard and considered argument of counsel and having examined the jacket file; it is hereby ORDERED:

1. Plaintiffs' Motion for Accounting is GRANTED as follows:

A. Defendants shall forthwith post to each private school presently operating in the state of Mississippi a blank Inventory Report form. By cover letter, signed by the defendant executive secretary, each private school shall be directed to file, within fifteen days from the date of the cover letter, a completed Inventory Report which records the number of state owned textbooks presently in use or in stock at the private school.

B. Upon the return of completed Inventory Reports defendants shall prepare a compilation which reflects for each private school presently operating in Mississippi: i) the number of state owned textbooks presently in use or in stock; ii) the cost of such books to the state of Mississippi.

2. Plaintiffs' Motion to Compel Defendants to Compile Data is GRANTED as follows:

The Attorney General of the state of Mississippi is required to promptly prepare and post a letter to the headmaster or principal of each private school presently operating in the state of Mississippi. The letter shall advise each

private school that this Court requested that it report the following information to the Attorney General within fifeen (15) days:

a) The number of students by race presently enrolled in the private school;

b) The number of faculty members by race presently employed by the private school;

c) The grades served by the private school.

3. No later than ten days after the due date of reports required in paragraphs 1 and 2 above, the Attorney General, or his representative, is requested to notify the clerk of this Court of the names of all private schools which have failed or refused to file either or both reports specified in this order. A copy of the notification to the clerk of the Court shall be sent, by certified mail, to each private school listed in the notification.

4. No sooner than five days after the Attorney General files notification with the clerk of this Court, plaintiffs and/or defendants, shall seek from this Court further instructions and guidance on the methods to be employed to obtain the reports required by this order. And the Court reserves ruling on sanctions to be imposed upon private schools which fail to file the reports required by this order.

5. Plaintiffs' Motion for Leave to Supplement the Record and Motion to Compel Answers to Request for Admissions or in the Alternative Motion to Supplement the Record are GRANTED as follows:

A. The Stipulations of Fact entered by the parties in *Coffey v. State Educational Finance Commission,* Civil Action No. 3906, S.D. Miss., three-judge district court, and attached to plaintiffs' October 9, 1970 Request for Admissions shall be entered by the clerk of this Court as part of the record herein and shall be considered by the Court as admissions by the state of Mississippi binding upon the State Textbook Purchasing Board;

B. Copies of depositions taken by the United States in connection with *Coffey v. State Educational Finance Commission,* Civil Action No. 3906, S.D. Miss., three-judge district court, may be filed by plaintiffs with the clerk of this Court and entered as part of the record herein as if plaintiffs had taken such depositions in connection with this action;

C. The document referred to as Defendants' Proffer of Additional Enrollment Statistics, an attachment to the Consent Order entered on June 26, 1970 in *Green v. Kennedy*, Civil Action No. 1355-69, D.D.C., three-judge district court, which document is included in plaintiffs' October 9, 1970 Request for Admissions shall be entered as part of the record in this cause; within thirty days from the date of this order defendants may file with the clerk of this Court, a designation which specifies errors contained in the document. And in the event that defendants fail to designate errors, this Court will consider the information reflected in Defendants' Proffer of Additional Enrollment Statistics as if fully proved by plaintiffs herein.

6. All reports required by this order and received by the Attorney General or the defendant Textbook Purchasing Board shall be made available to plaintiffs' counsel for reproduction and inspection.

ORDERED this 1st day of March, 1971.

/s/ WILLIAM C. KEADY
United States District Judge

Approved As To Form:

Melvyn R. Leventhal
MELVYN R. LEVENTHAL
Counsel for Plaintiffs

Jesse R. Adams, Jr.
JESSE R. ADAMS, JR.
Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DELORES NORWOOD, et al.,
Plaintiffs,
v.
D. L. HARRISON, SR., et al.,
Defendants.

Civil Action
No. WC70-53-K

MOTION TO SUPPLEMENT THE RECORD—
Filed August 9, 1971

Plaintiffs respectfully move this Court to enter an order supplementing the record in this cause to include the following:

1. A letter received from counsel for the College Hill Academy of Lafayette County recording information regarding that academy which was provided by agreement of the parties as an alternative to the taking of a deposition.

2. A compilation of private non-catholic schools presently receiving state owned textbooks, the number and value of textbooks at each such school, and the number of teachers and students by race at each such school during the 1970-71 school year. This chart was compiled by defendants pursuant to an order entered by Judge Keady and was transmitted to each member of the Court by counsel for defendants. But defendants failed to file a copy with the clerk of the Court.

3. A chart styled Interdependence of Public School Desegregation and the Formation and Growth of Private Academies, which has been sent to each member of the Court, but which does not as yet appear in the jacket file.

All documents referred to herein are attached to and made a part of the motion.

Respectfully submitted,
/s/ MELVYN R. LEVENTHAL
FRED L. BANKS, JR.
538½ North Farish Street
Jackson, Mississippi 39202

Sectarian

	Name of School	No. of Books	Cost to State	No. Students by Race *	No. Faculty by Race	Grades Served
1.	Presbyterian Day School	264	$ 576.45	135 W	7 W	K-5
x2.	French Camp Academy	654	2,672.58	99 W	14 W	9-12
3.	Chamberlain-Hunt Academy	829	3,398.82	360 W	26 W	7-12
4.	Clarksdale Baptist	2356	5,937.45	424 W 3 O	18 W	1-8
5.	First United Methodist	1305	3,029.25	169 W	9 W	1-6
6.	Presbyterian Day School	1247	2,323.11	141 *		
7.	St. George's Episcopal	1340	2,885.54	169 W	11 W	K-6
8.	Christ Episcopal Day School	2075	5,218.28	265 W	24 W	K-12
x9.	St. Paul's Inter-Parochial	1264	2,558.77	154 W 12 B	8 W	K-6
x10.	St. Andrew's Episcopal	2492	6,600.27	403 W 9 B	24 W 1 B	K-9
11.	Woodland Hills Baptist Academy	2279	5,598.42	428	16	1-10
x12.	Saints Academy	2148	7,259.40	273 B	17 B 1 W	1-12
13.	Heidelberg Baptist Academy	1993	5,557.50	295 W	13 W	1-12
14.	Jesus Name Faith	85	170.70	44 W	5 W	1-12
15.	St. John's Day School	1130	2,465.85	182 W 2 LA	12 W	K-6
16.	First Baptist Parochial	630	1,499.64	78 W	7 W	1-8
17.	Sylvarena Baptist Academy	1671	4,255.77	236 W	13 W	1-11
x18.	All Saints Episcopal	150	677.70	148 W 3 B	15 W	9-12
19.	Gospel Lighthouse Christian	119	472.95	22 W	3 W	1-12
	TOTALS	24,031	63,158.45	3611 White 297 Black 3 Oriental	242 White 18 Black	
20.	Adams County Private	2513	$ 8,327.34	1006	36	1-12
21.	Adams County Christian	3452	8,918.07	535 W	26 W	1-12
22.	Amite School Corporation	3950	11,875.26	581 W	25 W	1-12

23. Pine Hills Academy	1839	5,194.44	328 W	15 W	1-12
24. Gray Academy	1320	3,932.43	177 W	12 W	1-12
25. Shaw Educational Foundation	1480	4,443.00	905	47	1-12
26. Calhoun Academy	294	655.14	127 W	8 W	1-8
27. Carroll Academy	358	1,084.83	305 *		1-12
28. Chickasaw Academy	1420	3,586.17	164 *		1-12
29. Clarke Academy	387	1,478.04	340 *		1-12
30. Oak Hill Academy	2348	6,739.17	450 W	25 W	1-9
31. Pheba Academy	675	1 636.14	133 W	8 W	1-8
32. Happy Day School	652	884.73	107 W 3 C	7 W	1-3
33. Copiah Academy	2472	7,312.20	483 W	23 W	1-12
34. The Children's Academy	726	2,588.70	148	10	1-10
35. Union Private	1578	4,526.16	202	15	K-12
36. Sanford Academy	787	2,277.54	136 W	9 W	1-12
37. Covington School Foundation	512	1,494.36	75 W	6 W	1-9
38. J. A. Beeson Academy	1531	4,229.04	265 W	18 W	1-12
39. Kirk Academy	842	3,061.74	639 *		
40. Gremada Lake Academy	2523	7,119.58	381 W	13 W	1-12
41. Westminster Academy	252	773.86	132 W	15 W	1-7
42. Bearss Academy	417	1,146.18	117 W	5 W	K-8
43. Jackson Academy	3071	6,652.56	575	54	K-9
44. Southwest Academy	1167	2,649.12	131 W	9 W	1-8
45. Terry Academy	1378	3,884.61	157 W	13 W	1-11
46. Central Holmes	3861	12,787.11	501	21	1-12
47. Cruger-Tchula Academy	2299	7,712.64	438 *		
48. East Holmes Academy	2776	7,791.60	619 W	22 W	1-12
49. Four County Academy	815	1,905.90	76 W	5 W	1-8
50. Humphreys Academy	3480	10,000.71	395 W 3 C	22 W	1-12
51. Live Oak Academy	218	822.21	412 W	18 W	1-9

Name of School	No. of Books	Cost to State	No. Students by Race *	No. Faculty by Race	Grades Served
52. Claiborne Educational Foundation	2032	$ 4,792.38	252 W	13 W	1-9
53. Prentiss Christian School	779	1,975.95	180 W	10 W	1-9
54. Kemper Academy	3849	10,654.85	432 *		
55. College Hill Academy	513	1,701.51	199 *		1-12
56. Lawrence County Academy	717	2,149.32	177 W	11 W	1-12
57. Leake Academy	2369	6,809.19	500 W	20 W	1-12
58. M & L Academy	844	2,013.18	42 W	3 W	1-6
59. Greenwood Private Junior High	1160	4,288.95	227 W 1 I 1 C 1M	10 W	7-8
60. Pillow Academy	2453	7,802.87	1,189 *		1-12
61. Brookhaven Academy	2675	6,457.74	307 *		
62. Southwest Christian Academy	564	1,689.09	361 *		
63. East Lowndes Academy	1745	5,056.02	247 W	16 W	1-11
64. Heritage Academy	1593	4,029.81	350 W	17 W	1-8
65. Canton Academy	8437	25,506.60	1221 W 4 O	54 W	1-12
66. Madison-Ridgeland Academy	445	1,151.01	136 W	9 W	1-9
67. Tri-County Academy	1217	4,327.71	438 W	21 W	1-12
68. Columbia Academy	1514	4,914.35	379	23	1-12
69. West Marion Academy	2073	6,336.78	383	14	1-12
x70. C.A.D.E.T.	922	2,329.82	501 B 2W 1I	12 W 17B	K-12
71. Marshall Academy	1153	3,012.36	600 W	30 W	1-12
72. Mt. Pleasant Christian Academy	1254	3,498.30	149 W	10 W	1-9
73. North Mississippi Academy	442	1,230.96	95 *		
74. Montgomery-Carroll Academy	699	1,629.49	174 W	11 W	1-9
75. Pioneer Academy	438	922.65	45 W	4 W	1-8
76. Newton County Academy	887	2,046.92	78 W	5 W	1-8
77. Central Academy	1858	5,329.29	751 W	33 W	1-12

78. Starkville Academy	3229	9,562.77	553 W	24 W	1-12
79. North Delta Schools, Inc.	1021	3,373.19	268 *		
80. West Panola School	1143	3,134.67	203 W	15 W	1-12
81. Parklane Academy	1539	3,887.01	228 W	12 W	1-9
82. Quitman County Education Foundation	727	3,008.91	480 W	29 W	1-12
83. Brandon Academy	3912	11,447.46	589 *		
84. East Rankin Academy	1341	3,149.16	180 W	10 W	1-9
85. Flowood Academy	443	1,251.93	227 *		
*86. Piney Woods	673	2,712.27	200 *		
87. Rankin Academy	1510	5,302.47	284 W	11 W	1-12
88. Scott County Christian	2235	6,325.58	320 W	13 W	1-12
89. Sharkey-Issaquena Academy	1051	3,815.35	664 W	33 W	K-12
90. Simpson Academy	1266	3,427.89	270 W	14 W	1-12
91. Pines Academy	156	404.82	44 W	4 W	1-8
92. Central Delta Academy	1933	4,878.66	208 W 8 C	10 W	1-8
93. Indianola Academy	7985	24,029.01	1209	56	1-12
94. North Sunflower Academy	2243	7,841.28	626 W	27 W	1-12
95. Paynes Academy	1288	3,635.73	96 W	9 W	1-12
96. West Tallahatchie Academy	666	1,856.85	178 W	9 W	1-8
97. Hillcrest Academy	547	1,495.26	165 W	13 W	1-12
98. Magnolia Heights	1930	5,674.80	228 W	15 W	1-12
99. Northwest Academy	1613	4,347.15	239 W	13 W	1-12
100. Tunica Institute	2189	6,851.52	495 W	27 W	1-12
101. Citizen's School	1776	4,589.91	255 *		
102. Walnut Hills School	317	816.42	114 W	6 W	1-8
103. Deer Creek School	1821	5,126.76	387 W 9 O	24 W	1-12
104. Wayne County School Foundation	814	2,064.21	103 W	6 W	1-9
105. Centreville Academy	3750	10,295.55	407 W	18 W	1-12

Name of School	No. of Books	Cost to State	No. Students by Race *	No. Faculty by Race	Served Grades
106. Winston Academy	1781	$5,036.76	288 W	14 W	1-10
107. Benton Academy	3148	8,432.85	421 W	18 W	1-12
108. Bentonia Academy	874	1,951.35	82 W	6 W	1-8
109. Manchester Academy	1004	2,356.92	550 *		
TOTALS	149,953	431,232.15	23,858 White 501 Black 15 Chinese 13 Oriental 2 Indians	1249 White 17 Black	

x No Relief sought by plaintiffs against these Schools.
* School failed or refuses to provide enrollment; entry derives from Depositions or State Dept. of Education.

NOTE: The life of a textbook is 4 years with 25% depreciation each year.
Note appended by plaintiffs: The deposition of private school personnel or the deposition of Mr. Snowden reveal that the following additional private academies have in their possession state owned textbooks.

110. Highway Baptist School	1,304	$ 2,839.83	104	1-8
111. Jefferson Davis Academy	1,054	3,701.10	356	1-12
112. North Central Miss. Schools	723	1,602.87	67	1-9
113. Wilkinson County Christian	4,002	11,359.74	404	1-12
114. Pearl River Academy	660	1,209.06	104	1-8
	7,743	$20,712.60	1,035	

It is therefore necessary to revise the figures appearing in Plaintiffs' Brief, p. 4, as follows:

1. There are approximately 155 private non-catholic academies operating in the state enrolling approximately 42,000 students. (1970-71)
2. There are 114 private non-catholic academies, enrolling 35,800 students, presently receiving state owned textbooks. Seven of these 114 schools, enrolling 1,800 students, *are not* challenged by plaintiffs herein.
3. Plaintiffs seek relief against 107 academies, enrolling 34,000 students, which have in use or in stock 173,400 volumes of state owned textbooks, which have cost the state of Mississippi $491,000.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DELORES NORWOOD, ET AL.,
PLAINTIFFS

v.

D. L. HARRISON, SR., ET AL.,
DEFENDANTS

No. WC 7053-K

ORDER

Plaintiffs having filed their post-trial motion to supplement the record, and it appearing to the managing judge that it is proper for the record to be so supplemented; it is

ORDERED

That plaintiffs' post-trial motion to supplement the record be, and the same is hereby sustained and the record accordingly supplemented.

This, 9th day of August, 1971.

/s/ WILLIAM C. KEADY
United States District Judge
For the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DELORES NORWOOD, ET AL.,
PLAINTIFFS,
v.
D. L. HARRISON, SR., ET AL.,
DEFENDANTS.

Civil Action
No. WC70-53-K

MOTION FOR LEAVE
to Supplement the Record—filed May 15, 1972

Plaintiffs respectfully move the Court for leave to supplement and include in the record of this action the following documents attached hereto:

1. Oral Argument—Exhibit One, Statewide Private Non-Catholic Schools 1963-64;
2. Oral Argument—Exhibit Two, Statewide Enrollments;
3. Oral Argument—Exhibit Three, Schools Receiving Textbooks And Under Challenge In This Lawsuit;
4. Oral Argument—Exhibit Four, A Chart Recording Characteristics Of Private Schools Evidencing Coincidence Of Private School Formation And Growth And Public School Desegregation.

All four of these exhibits were before this Court prior to the entry of a Decision and Judgment. All were compiled from data in evidence through Stipulations.

May 9, 1972

Respectfully submitted,
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DELORES NORWOOD, ET AL., PLAINTIFFS,
v.
D. L. HARRISON, SR., ET AL., DEFENDANTS.

Civil Action
No. WC70-53-K

ORAL ARGUMENT—EXHIBIT ONE

Statewide
Private Non-Catholic Schools
1963-64

I. Black Schools			
1. Central Miss. College (Baptist; closed at end of 1965-66 school year)	K-12		122
2. CMI College High (Church of Christ)	K-12		178
3. St. Marks School of Jackson, Miss. (Episcopal; closed at end of 1965-66 school year)	1-8		97
4. Saints Academy (Church of Christ; Est. 1954)	K-12		305
5. Piney Woods (Est. Ca. 1910)	K-12		214
		TOTAL BLACK	916
II. White Schools			
6. French Camp Academy (Presbyterian; for children from broken or disrupted homes) (Est. Ca. 1860)	9-12		134
7. Chamberlain Hunt Academy (Presbyterian)	8-12		202
8. St. George Day School (Episcopal) (Est. 1959)	K-3		72

9.	Gulf Coast Military Academy (Serving primarily students residing outside of state) (Est. 1912)	2-8	156
10.	Jackson Academy (Est. 1959)	K-7	235
11.	St. Andrew's Episcopal Day School (Presently integrated)	K-6	151
12.	Little Red School House of Jackson, Miss. (for mentally retarded)	(ungraded)	58
13.	YMCA—Part Time (Closed at end of 1965-66 school year)	8-12	32
14.	Jackson Christian (Closed at end of 1964-65 school year)	K-6	25
15.	St. John's Day School	1-6	89
16.	Bass Memorial	9-12	146
17.	All Saints Episcopal (Now integrated)	9-12	146
		TOTAL WHITE:	1,446
		GRAND TOTAL (white & black):	2,362

IN THE UNITED STATES DISTRICT COURT
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DEFENDANTS.

Civil Action
No. WC70-53-K

ORAL ARGUMENT—EXHIBIT TWO

Statewide Enrollments

	Private Non-Catholic			Public		
		Change	# of Schools		Change	
1963-64	2,362		17	570,000		
1964-65	2,408	+ 46	21	576,000	+ 6,000	
1965-66	3,841	+ 1,433	41	583,000	+ 7,000	
1966-67	5,452	+ 1,611	49	582,500	— 500	
1967-68	6,546	+ 1,094	58	582,500	—	
1968-69	9,064	+ 2,518	69	581,500	— 1,000	
Sept. 1969	—		—[1]	575,500	— 6,000	—31,000
Feb. 1970	30,939	+21,875	124	550,500	—25,000	
Sept. 1970	42,000[2]	+11,061	155	534,500	—16,000	

[1] Statewide statistics not available; stipulations show only that by the end of the 1969-70 school year there were 30,939 students in 124 private academies.

[2] Estimate based on stipulations; the exact figure lies somewhere between 41,000 and 43,000.

IN THE UNITED STATES DISTRICT COURT
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DEFENDANTS.

Civil Action
No. WC70-53-K

ORAL ARGUMENT—EXHIBIT THREE

Schools Receiving Textbooks And Under Challenge In This Lawsuit

	Number of Schools Opening for First Time	Total Enrollment Upon Opening	Average Number of Students Upon Opening
Prior to 1963-64	3[a]	—	—
1963-64	1[b]	89	89
1964-65	2[c]	44	22
1965-66	16	1,308	82
1966-67	11	957	87
1967-68	4	212	53
1968-69	8	722	90
Sept. 1969	19	2,872	151
Feb. 1970	16[d]	4,444	277
Sept. 1970	28	5,816	207
TOTAL:	108		

[a] Chamberlain Hunt, St. George's, Jackson Academy.
[b] St. John's Day School.
[c] Clarksdale Baptist Church and Gospel Lighthouse Christian.
[d] Includes Tunica Church School now defunct.

DELORES NORWOOD, ET. AL. VS. D. L. HARRISON

Civil Action No. WC 70-53 K

ORAL ARGUMENT—EXHIBIT FOUR

KEY TO CHART

1—Academy began in or used at some time abandoned or former public school building.
2—School began in or used at some time church facilities not originally designed for full-time school.
3—Academy began in or used at some time private residence or other formerly non-school facility.
4—Academy began in new facilities constructed and designed for full-time school.
5—Academy opened for first time, added grades and/or had a significant increase in enrollment on date corresponding to a key public school integration date.
6—Academy's beginning grades and/or grades added correspond in whole or part to grades being desegregated in the public schools at the same time.
7—Academy is in county which had two or more academies begin at same time.
8—Academy began September, 1969 in public school district with 1969-70 final integration plan.
9—Academy began January or February, 1970 in public school district with 1969-70 final integration plan.
10—Academy began September, 1970 in public school district with 1970-71 final integration plan.
11—Academy was not accredited by State when it received textbooks.
12—Students brought some or all books with them when transferring from public school.
13—Academy covered by *Coffey* Appendix A or Appendix B or by both Appendix A and Appendix B.
14—Academy refused to give IRS assurance of its adoption of a racially non-discriminatory admissions policy and as a result had its tax exempt status revoked or its application for such status denied.
15—Academy in public school district of *Alexander v. Holmes.*

NAME OF ACADEMY	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
1. Adams County Christian	†	†	†	†	X	X*			X		†	†			X
2. Adams County Private	†	†	†	†	X	X					†	†	X	X	X
3. Amite School Corporation		X			X	X*	X		X						

4. Bearss Academy	†	†	†	†	X	X						†	†	X		X	
5. Benton Academy		X			X	X•	X		X							X	
6. Bentonia Academy		X			X	X•	X		X							X	
7. Brandon Academy		X			X	X•								X	X		
8. Brookhaven Academy	†	†	†	†	X	X•			†	(X)	†	†	†			X	
9. Calhoun Academy			X		X	X						X			X		
10. Canton Academy		X			X	X•								X	X	X	
11. Carroll Academy	X				X	X											
12. Central Academy	†	†	†	†	X	X						†	†			X	
13. Central Delta Academy	†	†	†	†	X	X•	X	X				†	†				
14. Central Holmes		X			X	X•	X							X		X	
15. Centreville Academy	†	†	†	†	X	X•	X		X				X			X	
16. Chamberlain-Hunt	†	†	†	†	†							†	†				
17. Chickasaw Academy		X			X	X											
18. Children Academy (The)	†	†	†	†	X	X•	X			X		†	†				
19. Christ Episcopal Day School	†	†	†	†	X	X						†	†				
20. Citizen's School		X			X	X						X		X	X		
21. Claiborne Educational Foundation	†	†	†	†	X	X						†	†	X	X		
22. Clarke Academy	†	†	†	†	X	X		X				†	†			X	
23. Clarksdale Baptist		X			X	X	X		X			†	†				
24. College Hill Academy	X				X	X										X	
25. Columbia Academy	X		X		X	X•	X		X					X			
26. Copiah Academy	†	†	†	†	X	X	X					†	†	X		X	
27. Covington School Foundation, Inc.	†	†	†	†	X	X						†	†	X	X	X	
28. Cruger-Tchula Academy	†	†	†	†	X	X	X					†		X	X	X	
29. Deer Creek Academy	X				X	X•						X[1]		X			

Name of Academy	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
30. East Holmes Academy		X			X	X*	X						X	X	X
31. East Lowndes Academy	↑	↑	↑	↑	X	X*				X	↑	↑			
32. East Rankin Academy	↑	↑	↑	↑	X	X		↑ (X)	↑		↑	↑			
33. Enid Academy	↑	↑	↑	↑	X	X*	X			X	↑	↑			
34. First Baptist Parochial		X			X	X*	X			X	X	X			
35. First United Methodist		X			X	↑					X				
36. Flowood Academy	↑	↑	↑	↑	X	X		↑ (X)	↑		↑	↑			
37. Four County Academy	↑	↑	↑	↑	X	↑	X	↑ (X)	↑		↑	↑			X
38. Gospel Lighthouse Christian School	↑	↑	↑	↑	X	X					↑	↑			
39. Gray Academy	↑	↑	↑	↑	X	X*					↑	↑	X	X	
40. Greenwood Private School		X			X	X*				X	↑				
41. Grenada Lake Academy	X				X	X*			X		X			X	
42. Happy Day School		X			X	X*				X					
43. Heidelberg Baptist	↑	↑	↑	↑	X	X*				X	↑	↑			
44. Heritage Academy	↑	↑	↑	↑	X	X*					↑	↑	X	X	
45. Highway Baptist		X			X	X*				X	X				
46. Hillcrest Academy	X				X	X*	X			X					
47. Humphreys Academy	↑	↑	↑	↑	X	↑					↑	↑		X	
48. Indianola Academy		X			X	X*	X				X	X	X		
49. J. A. Beeson Academy			X		X	X							X	X	X
50. Jackson Academy	↑	↑	↑	↑	X	X*	↑				↑	↑	X	X	X
51. Jefferson Davis Academy	X				X	X					↑		X	X	
52. Jesus Name Faith	↑	↑	↑	↑	↑	↑		↑ (X)	↑		↑	↑			
53. Kemper Academy	↑	↑	↑	↑	X	X*			X		↑	↑			X
54. Kirk Academy				X	X	X					X		X	X	
55. Lawrence County Academy	↑	↑	↑	↑	X	X		↑ (X)	↑		↑	↑			X

| | | |

	Name of Academy	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
81.	Presbyterian Day School (Coahoma County)		X			X	X*				X	†				
82.	Quitman County Educational Foundation		X	X		X	X*					†				X
83.	Rankin Academy	†	†	†	†	X	X		†	(X) †		†	†			
84.	St. George's Episcopal		X			X	†					†	†			
85.	St. John's Day School	†	†	†	†											
86.	Sanford Academy	†	†	†	†	†	X				X					
87.	Scott County Christian Academy	†	†	†	†	X	X*				X	†	†			
88.	Sharkey-Issaquena Academy		X			X	X							X	X	X
89.	Shaw Educational Foundation (Bayou Academy; Duncan Academy)	X				X	X					†	†	X		
90.	Simpson Academy	†	†	†	†	X	X*				X					
91.	Southwest Academy	†	†	†	†	X	X	†				†	†	X	X	X
92.	Southwest Christian Academy		X			X	X					X		X	X	X
93.	Starkville Academy				X	X	X*				X				X	
94.	Sylvarena Baptist Academy	†	†	†	†	X	X*				X	†	†			
95.	Terry Academy	†	†	†	†	X	X	†				†	†			X
96.	Tri-County Academy	†	†	†	†	†	†				X	†	†			X
97.	Tunica Institute of Learning		X			X	X							X	X	
98.	Union Private School	†	†	†	†	X	X*	X			X	†	†			
99.	Walnut Hills School	†	†	†	†	X						†	†	X		
100.	Wayne County Educational Foundation	†	†	†	†	X	X*				X	†	†			

101. West Marion Academy	?	?	?	?	X	X*			? (X) ?			?	?				X
102. Westminister Academy	?	?	?	?	X							?	?				
103. West Panola School, Inc.	X				X	X*	X				X	X					
104. West Tallahatchie Academy	X				X	X*	X				X	X					
105. Wilkinson County Christian Academy	?	?	?	?	X	X	X		X			X					
106. Winston Academy			X		X	X	X										
107. Woodland Hills Baptist Academy	?	?	?	?	X	X*	?					?	?				X
Unnamed Tunica Church Schools		X			X	X*			X			X	X				
TOTALS:	19	26	7	4	102	97X (62X*)	33	13	17	28	18	5	29	28	32		

[1] Whenever a question mark appears on this chart it indicates that information was unavailable usually because no deposition was taken of the school involved.

[1] X* indicates that the school opened at a time when *all* of its grades, upon opening, were being desegregated in the public schools.

[3] X[1] indicates that the school offers grades 1-12 but is only accredited for grades 1-8.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DELORES NORWOOD, ET AL.,
PLAINTIFFS,

V.

D. L. HARRISON, SR., ET AL.,
DEFENDANTS.

No. WC70-53-K

ORDER

Plaintiffs having moved for leave to supplement the record by the incorporation of four exhibits used in oral agrument, and it appearing that such exhibits were compiled on the basis of data already in evidence through stipulation of counsel and that the exhibits would expedite the consideration of the entire record; it is

ORDERED

That leave is hereby granted to plaintiffs to supplement and include in the record of this cause the four exhibits to which reference is made in their motion, and the Clerk of this court is hereby directed to make such inclusion.

This, 15th day of May, 1972.

WILLIAM C. KEADY
United States District Judge
For the Court

Notation re Opinion and Judgment of the District Court

The District Court opinion and judgment, entered April 18, 1972, are printed in the Jurisdictional Statement, and may be found therein at pages 1a-23a. They are therefore not printed in this Appendix.

☆ U.S. Government Printing Office: 1973—492-990/457

JURISDICTIONAL STATEMENT

JUL 14 1972

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1972

No. .....

DELORES NORWOOD, *et al.*,

Appellants,

—v.—

D. L. HARRISON, SR., *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

MELVYN R. LEVENTHAL
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IN THE

Supreme Court of the United States

October Term, 1972

No. .....

DELORES NORWOOD, *et al.*,

Appellants,

—v.—

D. L. HARRISON, SR., *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the United States District Court for the Northern District of Mississippi, reported at 340 F. Supp. 1003 (N.D. Miss. 1972), is appended hereto, Appendix A, pp. 1a-22a.

Jurisdiction

This is an appeal from a final judgment entered by a three-judge district court, convened pursuant to 28 U.S.C. §§2281 and 2284, denying a permanent injunction enjoining state officers from enforcing a state statute having state-wide application. Jurisdiction of this Court is ac-

cordingly invoked pursuant to 28 U.S.C. §1253. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963).

Complaint was filed on October 8, 1970. The case was submitted to the district court on the basis of stipulations, depositions, briefs and oral argument on July 9, 1971. The district court's judgment, denying all relief and dismissing the complaint, was rendered on April 17, 1972, and entered on April 18, 1972 (Appendix A, p. 23). Notice of appeal was filed in the United States District Court for the Northern District of Mississippi on May 16, 1972 (Appendix A, p. 24a).

Constitutional and Statutory Provisions Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

This case also involves §6656 of the Mississippi Code, 1942 (volume 5, pp. 495-96 of the Mississippi Code, 1942, Chap. 152, Laws of 1940), which states:

> *Plan.*—This act is intended to furnish a plan for the adoption, purchase, distribution, care and use of free textbooks to be loaned to the pupils in all elementary and high schools of Mississippi.
>
> The books herein provided by the board shall be distributed and loaned free of cost to the children of the free public schools of the state, *and all other schools located in the state,* which maintain educational standards equivalent to the standards established by the state department of education for the state schools.
>
> Teachers shall permit all pupils in all grades of any public school to carry to their homes, for home

study, the free text books loaned to them, and to carry to their homes, for home study, all other regular text books used in the public schools of the state whether they be free text books or not.[1] (Emphasis added.)

Question Presented

Whether Miss. Code, 1942, §6656, to the extent that it provides for the distribution and use of state owned textbooks to private racially segregated academies formed for the purpose and/or having the effect of providing white students with an alternative to public integrated schools, violates the Equal Protection Clause of the Fourteenth Amendment.

Statement

I. *Proceedings Below.*

January 23, 1970, the United States District Court for the Northern District of Mississippi entered an order requiring the integration of all public schools of Tunica County, Mississippi, no later than February 2, 1970, in accordance with standards established by this Court in *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), and *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969). Upon the entry of this order *all* white students of Tunica County withdrew from public schools and formed a private academy housed in church facilities. The principal and 17 of 21 high school teachers of the Tunica County system resigned in mid-year to assume positions with the new private school.

---

[1] The statutes defining Mississippi's textbook program are appended hereto, Appendix B, pp. 27a-43a.

December 4, 1969, the Executive Secretary of the Mississippi Textbook Purchasing Board, appellee herein, circulated a memorandum to "County and Separate District Superintendents" which stated:

> Subject: Textbooks for Private Schools.
>
> We have many disturbed parents since the Court decisions. Many of them are going to organize private schools, and they are going to need books.
>
> Since all the money has been allotted for this year, it will be necessary for the superintendents to transfer books with the student as he transfers to the private school. . . .
>
> We appreciate your cooperation in this difficult situation.

As a result of this memorandum the textbooks used by white students fleeing integrated education in Tunica County and throughout the state were transferred from public schools to private segregationist academies in January, 1970.[1]

October 8, 1970, four black students of Tunica County filed this class action to enjoin the Mississippi Textbook Purchasing Board and its Executive Secretary from distributing state-owned textbooks to the private academies of Tunica County and all other academies of Mississippi formed in response to the implementation of this Court's *Brown*,[*] *Alexander* and *Green* decisions. Plaintiffs alleged, *inter alia*, that:

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[1] Tunica County public school officials continued to pay the salaries of the white teachers and the principal who abandoned the public schools in favor of the newly formed private academy. This practice was enjoined and restitution ordered. *U.S.* v. *Tunica County School District*, 323 F. Supp. 1019 (N.D. Miss. 1970), affirmed, 440 F.2d 377 (5th Cir. 1971).

[*] *Brown* v. *Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955).

[T]heir right to a racially integrated and otherwise non-discriminatory public school system, vindicated by order of . . . [the district court] dated January 23, 1970 [*United States and Driver* v. *Tunica County School District*, . . .] and their right to the elimination of state support for racially segregated schools, have been frustrated and/or abridged by the creation of the racially segregated Tunica County Institute of Learning and the policies and practices of defendants as set forth below . . .

Beginning with the 1964-65 school year—when the first school districts in Mississippi were required to integrate under freedom of choice—and through the present, numerous private schools and academies have been either formed or enlarged, which schools have established as their objective and/or have had the effect of affording the white children of the State of Mississippi racially segregated elementary and secondary schools as an alternative to racially integrated and otherwise non-discriminatory public schools.

The defendants have provided these racially segregated schools and academies and the students attending such schools, . . . textbooks purchased and owned by the State of Mississippi and have thereby provided state aid and encouragement to racially segregated education and have thereby impeded the establishment of racially integrated public schools in violation of plaintiffs' rights assured and protected by the Fourteenth Amendment to the Constitution of the United States.

Appellants prayed for an order enjoining the Mississippi Textbook Purchasing Board from any further distribution of state owned textbooks to segregationist academies and for an order recalling state textbooks which had al-

ready been distributed to such institutions. After stipulations were filed and depositions taken, appellants refined their prayer for relief: we sought an order withdrawing state textbook aid from 148 specifically named private academies formed or enlarged for the purpose or with the effect of providing white students with an alternative to public integrated education.[3]

April 17, 1972, the district court rendered its opinion holding that: (a) plaintiffs had failed to demonstrate that textbook aid was vital to the private schools, i.e., that whites would return to public schools if textbook aid was withdrawn; moreover, public integrated education was secure since 90% of the student population of the state continued to enroll in public schools; (b) the statute under challenge was enacted in 1940 and was hence free of any specific intent to aid private racially segregated academies; (c) the state's statute contemplated textbook aid to students and not to schools and was therefore valid under the distinction approved by this Court in the context of the First Amendment and aid to parochial education. *Board of Education* v. *Allen*, 392 U.S. 236 (1968).

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[3] Appellants did not challenge textbook aid to the Catholic School System of the state which contains 47 schools and enrolls 12,100 students because that system has generally not been made available to white students fleeing integrated public schools. In addition, we excluded 7 academies which were either all-black, integrated or serving the needs of abandoned, orphaned or retarded children.

Of the 148 specifically named academies against which plaintiffs sought relief, 107 were receiving textbooks and another 41 were eligible but not participating in the state's program.

II. *The Growth of Private Academies and Their Impact on Public Education.*

A. State-Wide Perspective.

The district court found that by the commencement of the 1970-71 school year a network of 148 private segregated academies enrolling approximately 42,000 students had been formed in the state to provide white students with an alternative to integrated public schools. As we demonstrate below the creation and enlargement of these academies occurred simultaneously with major events in the desegregation of public schools and frustrated the attainment of fully integrated public schools and the promise of *Brown, Green* and *Alexander*.

The decade immediately following *Brown*—1954-1964—was marked by "Massive Resistance" and public schools were operated on an absolutely segregated basis. Accordingly, as late as the 1963-64 school year there was virtually no private segregationist school system in the state.[4]

In 1963, black students in Jackson, Leake County, Biloxi and Clarksdale filed the state's first school desegregation suits.[5] In 1964, these four districts were required to admit black first graders into white schools and the private segregationist academy appeared for the first time. White Citizens' Council School #1 and Southside Academy

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[4] During the 1963-64 school year there were 17 private non-catholic academies enrolling 2,362 students operating in the state. Five enrolled black students only; two were schools for retarded, orphaned or abandoned children; one was a Military Academy; two were parochial schools now operated on an integrated basis; two operated part time programs enrolling only 25 students. The five remaining schools enrolled only 722 students.

[5] The late Medgar Evers filed the state's first school desegregation suit in April, 1963. *Evers* v. *Jackson Municipal Separate School District*, 328 F.2d 408 (5th Cir. 1964).

opened their doors in Jackson; Clarksdale Baptist School began an elementary program for the first time; and St. George Day School, also of Clarksdale, doubled its enrollment and added three grades to its curriculum. The ~~Lake~~ Leake County Academy opened with a curriculum limited to first graders. These five schools were the only new or enlarged private academies operating in the state during the 1964-65 school year.

1965-66 witnessed the implementation of the Civil Rights Act of 1964 and the beginning of a concert of effort involving the Department of Justice, Department of Health, Education and Welfare and private litigants to promote integrated public schools. Prodded by *Singleton* v. *Jackson Municipal Separate School District*, 348 F.2d 729 (5th Cir. 1965), most public school districts in the state integrated at least four grades under freedom of choice during the 1965-66 school year. And by 1965-66 Mississippi counted 41 private segregationist academies enrolling 3,841 white students.

> [D]uring the 1965-66 school year twenty new private schools . . . were added [to the twenty-one] that had been in operation in 1964-65. In each instance the new schools opened in public school districts which either were under court order to desegregate or had submitted voluntary desegregation plans to the United States Department of Health, Education and Welfare. *Coffey* v. *State Educational Finance Commission*, 296 F. Supp. 1389, 1391 (S.D. Miss. 1969).

Green and *Alexander* implemented in Mississippi during the 1969-70 or 1970-71 school year signalled the end of freedom of choice and token desegregation; all students in Mississippi public schools were then assigned under "terminal" plans for desegregation. 1969-70 also witnessed

the opening of 55 new private academies and the withdrawal of 21,875 white students from public schools. During the 1970-71 school year an additional 11,061 white students withdrew from public schools to enroll in 31 new academies. (Public and private school enrollments for each year, 1963-64 through 1970-71, are contained in Appendix C hereto.)[6]

In almost all cases the private segregationist academies were opened without any meaningful planning and on the "thinnest financial basis." *Coffey* v. *State Educational Finance Commission*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969). No less than 19 were opened in obsolete and abandoned public school buildings; an additional 26 were opened in church facilities intended for Sunday School purposes only; seven academies were opened in private homes or in buildings that were not constructed to house educational facilities. Of the approximately 100 academies for which information is available through deposition,[7] only four opened in newly constructed facilities designed to house an educational program. Many of the schools operate without any formal budget and a few depended upon contributions rather than tuition.

Virtually all of the academies obtained the majority of their teachers and administrators from the public school systems. Virtually all rely upon the desegregation of public schools and "white flight" for their survival.

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[6] The record in this case was closed before exact 1970-71 enrollment figures were available and all references to such enrollments are estimates accepted by the district court.

[7] There are 104 depositions contained in this record.

B. Impact of Private Academies on Public School Desegregation in Specific School Districts.

Although the district court found that 90% of the state's school population continues to attend public schools it carefully refrained from any specific finding that private academies have not undermined public integrated education. In fact, the state-wide retention statistic of 90% depends upon the inclusion of many schools districts which have only a token number of black students. In the entire "gulf coast" of Mississippi and several of the northernmost school districts of the state, for example, there has been less resistance to public school desegregation.[8] But in districts where public officials have provided no leadership for desegregation and blacks constitute a larger percentage of the student population, the implementation of freedom of choice or terminal plans of pupil assignment triggered the decimation of the white public school enrollment and the resegregation of public schools.

The following desegregation histories of specific school districts illustrate the pattern which emerged upon desegregation in *all* school districts wherein blacks constitute a substantial segment of the student enrollment.

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[8] Indeed, the record shows that such districts were generally desegregated without litigation and at least one year in advance of compliance in other parts of the state. Biloxi Municipal Separate, one of the defendant districts in the original school desegregation cases in 1963-64, is 85% white and without any private academy. It desegregated all twelve grades under freedom of choice by the 1966-67 school year although it could have easily obtained a stay until the 1967-68 school year.

(1) *Holmes County School District*[9]

In September, 1965, the United States District Court for the Southern District of Mississippi ordered Holmes County to desegregate grades 1-4 under freedom of choice. Concurrently, three private academies, limited to grades 1-4 or 1-6 and enrolling approximately 450 students, were opened. By the close of the 1967-68 school year, when the Holmes County system was desegregated under freedom of choice for all twelve grades, the private schools had expanded their program to twelve grades and their combined enrollment to 650 white students.

Holmes County desegregated its schools under a terminal plan in September, 1970.[10] At that moment one additional private school opened in the county and all but a handful of white students formerly enrolled in the county's public schools withdrew to attend private segregationist academies. Holmes County presently has two school systems: one public, staffed and attended by blacks; the other private, and staffed and attended by whites who abandoned the public schools upon this Court's mandate in *Alexander*. The appellees treat both school systems as equals under the state's textbook program.

(2) *Canton Municipal Separate School District*

The Canton Academy was opened in September, 1965 concurrently with the implementation of a freedom of choice plan for grades 1-4 in the public school system. At

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[9] The interdependence of public school desegregation and the formation and growth of private academies in Holmes County was discussed in *Coffey* v. *State Educational Finance Commission*, 296 F. Supp. 1389, 1391, f.n. 7, (S.D. Miss. 1969) and *Green* v. *Kennedy*, 309 F. Supp. 1127 1133 (D.C. 1970).

[10] Holmes County was one of three districts consolidated under the *Alexander* caption which was given until September 1970 to implement a "terminal" plan.

the close of the freedom of choice stage of desegregation (1968-69), the Canton Academy enrolled 140 students in a curriculum limited to grades 1-8. On January 19, 1970, at the precise moment public schools opened under the terminal plan of pupil assignment mandated by this Court in *Alexander*, the Canton Academy expanded to serve grades 1-12. Its enrollment surged to 1,322, or virtually the entire white student body of the Canton Municipal Separate School District. At the same moment, the academy was moved into an abandoned tent factory with a staff of 20 white teachers who had left the public schools and with textbooks supplied by appellees herein. (The experience of the Tunica County system, wherein named plaintiffs attend school, was identical to that of Canton and Holmes County, *supra*, pp. 4-5.)

(3) *Jackson Municipal Separate School District*

Prior to the 1964-65 school year Jackson and the surrounding Hinds County counted only three white private academies.[11] All were limited to the elementary grades and their combined enrollment totaled 411. The 1964-65 school year witnessed the desegregation of grade one under freedom of choice and Citizen's Council School #1 and Southside Academy opened as small elementary schools serving grades 1-4. In September, 1965, Jackson and Hinds County desegregated four grades under freedom of choice and announced that all twelve grades would be so desegregated by 1967-68. During the same month White Citizen's Council #1 expanded its program to all twelve grades and increased its enrollment from 25 to 103 students while Southwest Academy and First Presbyterian Day School opened for the first time. When all twelve grades of the public system had been desegregated in

[11] St. Andrews Episcopal (integrated), Jackson Academy (opened in 1959) and Jackson Christian.

1967-68, there were nine segregationist academies enrolling 1,250 students operating throughout Jackson and Hinds County.

Terminal plans of pupil assignment were implemented in Jackson and Hinds County in January and September, 1970. In September, 1969, the White Citizen's Council operated three schools enrolling 449 students. In January, 1970, enrollment at Council Schools rose to 2,920 and other groups opened three new academies. In September, 1970, when further changes in the plans of pupil assignment were implemented, the White Citizen's Council opened three new academies while other private groups opened two more. By the 1970-71 school year there were *at least* 18 private academies enrolling over 10,000 students operating in the Jackson-Hinds County area.[12] Jackson school officials recently explained the impact of private academies upon their system to the court:

> For this pattern is emerging: the Courts will attempt to achieve a percentage result on the basis of projected enrollments; these enrollments will be rendered inaccurate by continued loss of white students. . . .
>
> It is an undeniable fact that desegregation cannot be accomplished without the presence of white students in the public schools. Surely it is not absolutely necessary for a community to watch more than 40% of its white students leave the public schools [to attend private academies] in the space of one year. Enrollment of white students in the system was 20,966 in September, 1969 and 12,095 in September, 1970.[13]

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[12] These 1970-71 statistics are estimates accepted by the district court.

[13] *Jackson Municipal Separate School District* v. *Derek Jerome Singleton, cert. denied*, 402 U.S. 944 (1971); Petition for Writ of Certiorari, pp. 29-30.

The histories reviewed above are not exceptional. The pattern—public school desegregation followed by the withdrawal of a substantial number of white students to private academies and the resegregation of public schools —was repeated in school district after school district throughout the state.

III. *The State's Textbook Program.*

A. The Program Generally.

Sections 6634-6659.5 of the Miss. Code of 1942 (Appendix B, p. 27a et seq.), provide the framework for the selection, purchase and distribution of textbooks used in the state's schools. The laws were enacted in 1940 and amended, insignificantly, in 1942, 1944, 1946, 1960 and 1966. Prior to the initiation of the free textbook program, parents were required to purchase textbooks (§6511). Initially the Act provided textbooks for the elementary curriculum only; in 1942, the legislature extended the program to high school grades (§6658).

Sections 6634 and 6641 establish the Mississippi Textbook Purchasing Board and assign to that agency plenary authority over the state's multi-faceted program. Board members are the Governor, the State Superintendent of Education, and three others appointed by the Governor for terms of four years. The Board employs an Executive Secretary who serves as full-time administrator. All members of the Board and the Executive Secretary are appellees herein.

Textbooks may only be purchased "for use in those courses set up in the state course of study adopted by the State Board of Education, or courses established by special acts of the legislature" (§6646). For each such course of study there is a "rating committee" consisting of

educators, and other "persons competent in the appraisal of books" appointed by the Governor and State Superintendent of Education (§6641(d)). No textbook may be adopted or purchased by the appellees unless it is first approved by the responsible rating committee.

Once approved, textbooks are purchased under contracts between appellees and publishers at a price "not . . . higher than the lowest prices at which the same books are being sold elsewhere in the United States" (§6646(1)). The publishers are required to "maintain a depository at a place within Mississippi to be named by the Board [Jackson] where a stock of books sufficient to meet all reasonable and immediate demands [is] kept" (§6641(f)).

Appellees send to each school district (and now each private school)[14] requisition forms which list all textbooks available free through the state. The school district or private school completes the requisition form and returns it to the Purchasing Board where it is reviewed by the

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[14] Prior to 1970 each County Superintendent of Education was required to requisition textbooks for all schools, *public and private*, geographically located within his county. The requisition was then approved by the Textbook Purchasing Board and thereafter shipment was made by the School Book Depository directly to the consignee specified by the County Superintendent of Education.

In 1970 Congress enacted the Emergency School Assistance Act appropriating funds to aid school districts converting to unitary systems. The act made it unlawful for any recipient to "engage . . . in the gift, lease or sale of real or personal property or services to a non-public elementary or secondary school or school system practicing discrimination on the basis of race, color or national origin." P.L. 91-381, 84 Stat. 806, U.S. Code Congressional and Administrative News, September 5, 1970, pp. 3318-3319. Public school officials wishing to participate in this federal program were forced to disassociate themselves from the private segregatist academies. As a result, the Textbook Board, in 1970, established new distribution regulations which eliminated County Superintendents as conduits for the distribution of textbooks to private academies. The distribution regulations are reproduced in the district court's opinion, footnote 2, Appendix A hereto, pp. 5a-6a.

Executive Secretary. After approval, the form is sent to the Textbook Depository in Jackson which fills the order and ships the textbooks directly to the school district or private school. All shipping charges are billed to the Textbook Purchasing Board (§§6648(f), [illegible]).

B. The Extent of Textbook Aid to Private Racially Segregated Academies.

Appendix D hereto (46a) lists the 107 academies which receive textbooks from the State of Mississippi and which were found by the district court to have been "formed throughout the state since the inception of public school desegregation."

During the 1970-71 school year these academies enrolled approximately 34,500 students and held 175,000 volumes costing the state of Mississippi approximately $490,000. The annual per pupil expenditure for new or replacement textbooks approximates $6.00, which will result in an annual recurring state expenditure for these academies of approximately $207,000.

The district court found that there are 8,000 students enrolled in an additional 41 private academies which do not, at this time, participate in the state's program. Accordingly, an additional $120,000 in initial inventories and $50,000.00 annually thereafter is available to private segregationist academies.[15]

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[15] The Executive Secretary testified that the program was not administered strictly on a per pupil allotment basis. Rather, they sought to provide all textbooks needed and a school could exceed its allotment by merely requesting additional aid.

The Questions Presented Are Substantial

The decision of the court below upholds the action of the State of Mississippi in providing financial assistance to buy textbooks for pupils attending more than 100 racially segregated private schools which were formed to promote evasion of public school desegregation in the State. The court below held inapplicable prior precedents striking down as unconstitutional other forms of state aid to these same segregationist academies. The court below upheld the supplying of textbooks bought with tax money and distributed by state officials at these segregationist institutions on the ground that the state acted under a statute which had no racial motive, that the textbook aid was not essential to continued operation of the segregationist academies, and that similar aid had been held to be consistent with the Establishment of Religion Clause of the First Amendment. We believe that the first ground is legally insufficient. The second ground is both incorrect and legally irrelevant. The Constitution forbids all public support of school segregation. *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958). The third ground relating to the Establishment Clause is not decisive of the racial discrimination issues in this case under the Equal Protection Clause.

The State of Mississippi and all of its agencies must be guided by their "affirmative" and continuing duty to remedy the effect of past racial discrimination and convert school systems from dual to unitary operation. The provision of free textbooks to academies which drain public schools of white students and faculties and which thereby frustrate the attainment of fully integrated public schools is inconsistent with this paramount duty.

In *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430, 437-38, he Court was confronted with the very

argument relied upon by the court below. There the defendant school board asserted that its only duty under the Equal Protection Clause was to adopt a neutral stance and permit "every student regardless of race . . . [to] 'freely' choose the school he will attend." The Court held that the state could not remedy its long history of support and encouragement for racial segregation by standing neutrally aside. Rather, state agencies were charged with an "affirmative" duty to take whatever steps might be necessary to convert to a unitary system.[16]

This mandate which commands appellees to align themselves unequivocally with public integrated education was recently imposed upon the federal government in *Green* v. *Kennedy*, 309 F. Supp. 1127 (D. D.C. 1970), *appeal dismissed for want of jurisdiction, sub nom. Cannon* v. *Green*, 398 U.S. 956 (1970); and see *Green* v. *Connally*, 330 F. Supp. 1150 (D. D.C. 1971), *affirmed sub nom. Coit* v. *Green*, 404 U.S. 997 (1971). There the Court was confronted with mere indirect aid to private academies and with a neutral statute enacted without any discriminatory motive. The

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[16] In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Court again relied upon the state's duty to form a meaningful remedy for past policies and practices of segregation, upholding the use of a variety of techniques aimed at uprooting an entrenched dual system. In *North Carolina Board of Education* v. *Swann*, 402 U.S. 43 (1971), a statute tending to interfere with the formulation of a remedy for racial segregation was held unconstitutional. And in *Wright* v. *Council of the City of Emporia*, 40 U.S.L. Week 4806, 4812, the Court held that "a new school district may not be created where its effect would be to impede the process of dismantling a dual system."

See also *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 869, *affirmed en banc*, 380 F.2d 385 (5th Cir. 1967):

> *"The only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration"* (emphasis in original).

Court held on motion for preliminary injunction[17] that donations to segregationist academies of Mississippi could not be offset against income as charitable contributions for federal income tax purposes because:

> Where there is a showing, as here, that a dual system of segregated schools was established and maintained in the past either under State mandate or with substantial help from State involvement and support, the State and the school districts are under a *present, continuing and affirmative* duty to establish a "unitary, nonracial system of public education * * * a system without a 'white' school and a 'Negro' school, but just schools." * * * The Federal Government is not constitutionally free to frustrate the only constitutionally permissible state policy, of a unitary school system, by providing government support for endeavors to continue under private auspices the kind of racially segregated dual system that the state formerly supported. (*Green* v. *Kennedy*, 309 F. Supp. 1127 at 1137) (emphasis added)).

The affirmative duty of *Green* v. *County School Bd. of New Kent County, supra*, underlies the recent decisions of this Court holding unconstitutional legislation providing tuition grants for students attending private segregated academies. *Brown* v. *South Carolina Board of Education*, 296 F. Supp. 199 (D. S.C. 1968), *affirmed per curiam*, 393 U.S. 222 (1968); *Poindexter* v. *Louisiana Finance Commission*, 274 F. Supp. 833 (E.D. La. 1967), *affirmed per curiam*, 389 U.S. 571 (1968). See *Wallace* v. *U. S.*, 389 U.S. 215 (1967), *affirming Lee* v. *Macon County Bd. of Ed.*, 267

[17] The final decision reached the same result on statutory rather than constitutional grounds, but the decision has obvious strong constitutional overtones. See *Coit* v. *Green, supra*.

F. Supp. 458, 475 (M.D. Ala. 1967). And relying entirely upon this Court's decisions in *Brown* and *Poindexter*, a district court statted the rule of law in *Griffin* v. *State Board of Education*, 296 F. Supp. 1178, 1181 (E.D. Va. 1969):

> "[T]he validity of a tuition plan is to be tried on a severer issue:: whether the arrangement in *any* measure, no matter how slight, contributes to or permits continuance of segregated public school education.
>
> • • •
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> To repeat, our translation of the imprimatur placed upon *Poindexter* by the final authority is that *any* assist *whatever* by the State towards provision of a racially segregated education, exceeds the pale of tolerance demarked by the Constitution." (Emphasis in original.)

Under this ~~test~~ test the Court held that the Virginia statutes were void:

> Indisputably, the State supplies the money; ~~income~~ it comes from the public treasury; it goes to individual residents who may expend it for a segregated classroom. Thus, the Virginia payments are made available to help in giving life to an educational forum decried by the Federal Constitution. . . .
>
> An absolute and unequivocal prohibition is the logical effectuation of the intendment flowing from the recent rulings of the Supreme Court. (*Griffin, supra*, at 1181.)

The courts have similarly outlawed a variety of other schemes in which public school properties were transferred to aid private racially segregated schools. See *Wright* v. *City of Brighton*,, 441 F.2d 447 (5th Cir), *cert. denied sub*

nom. Hoover Academy, Inc. v. *Wright*, 404 U.S. 915 (1971); *Aaron* v. *Cooper*, 261 F.2d 97 (8th Cir. 1958); *United States* v. *Hinds County School Board*, 433 F.2d 598 (5th Cir. 1969). *Accord: Blackwell* v. *Anguilla Line Consolidated School Dist.*, No. 28030 (5th Cir., Nov. 24, 1969) ("No abandoned school facility under this plan, if any, shall be used for private school purposes"); *United States* v. *Covington County School Dist.*, No. 28030 (5th Cir., Dec. 17, 1969) ("It is further ordered that the Lincoln Elementary School facility shall not be used, leased, or sold for private school purposes"); *Anderson* v. *Canton Municipal Separate School Dist. & Madison County School Dist.*, No. 28030 (5th Cir., Dec. 22, 1969) (rule to show cause why injunction should not issue); *Lemon* v. *Bossier Parish School Board*, Civ. No. 10,687 (W.D. La., Sept. 25, 1970) (granting injunction against use of public school athletic field for game between two private schools; field had been leased in Lions Club, sponsor of game).

The proper question then is whether state textbook aid to academies which interfered with, and in some cases rendered meaningless, the promise of fully integrated public schools, "hinders or furthers" [18] the dismantling of dual school systems. The question almost answers itself: textbook aid enables private academies operating on the "thinnest financial basis" (*Coffey* v. *State Educational Finance Commission*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969)) to avoid expending sums for a vital aspect of their educational program. It obviously aids the segregationist schemes to have textbooks selected, purchased, and distributed by the State. But whatever the extent of benefit, "state support of segregated schools through any arrange-

[18] See *Wright* v. *Council of the City of Emporia*, 40 U.S.L. Week 4806, 4809 ("Under the principles of *Green* and *Monroe*, such a proposal must be judged according to whether it hinders or furthers the process of school desegregation").

ment, management, funds or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958).

In the face of these authorities, the district court held:

> [T]he racial identity of the child had nothing to do with the original enactment of the Mississippi statute nor has it had anything to do with the receipt of a free textbook throughout a period of more than ~~70~~ 30 years. Every Mississippi school pupil, before and since 1954 . . . whether enrolled in public, private or parochial schools, of whatever race, has received the free textbooks without question or impediment. (Appendix A, 15a.)
>
> • • •
>
> It is plain . . . that the books have not been issued to the schools but to the students. As in the case of public schools, private and sectarian school authorities are held responsible for books as a matter of orderly administration. The statute does not authorize the distribution of books to schools, only to pupils. (Appendix A, 16a).
>
> • • •
>
> There is no showing that any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in public schools now unitary. (Appendix A, p. 21a.)

The district court has thus upheld Mississippi's textbook legislation on the grounds that the statute is neutral on its face and devoid of any purpose to aid private segregationist academies. But this Court has made it abundantly clear

that state legislation and policy, especially in the field of education and in systems converted from dual to unitary operation, must be measured by its effect rather than its purpose:

> [A]n inquiry into the "dominant" motivation of school authorities is as irrelevant as it is fruitless. The mandate of *Brown II* was to desegregate schools and we have said that "the measure of any desegregation plan is its effectiveness." . . . Thus, we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect. *Wright* v. *Council of the City of Emporia, supra,* 40 U.S. Law Week at 4810.

Similarly, the district court's reliance upon *Board of Education* v. *Allen,* 392 U.S. 236 (1968), is misplaced. All of the tuition grant legislation provided grants directly to students and not to schools and all such legislation has been held unconstitutional by this Court. Although the distinction between aid to a student and aid to a school may be relevant in the context of aid to parochial education and the First Amendment, it finds no support in the equal protection decisions of this Court. *Green* v. *Connally,* 330 F. Supp. 1150, 1167-1169 (D. D.C. 1971), *affirmed sub nom. Coit* v. Green, 404 U.S. 997 (1971).

The Court's inquiry in the *Allen* case was properly addressed to whether state textbook aid was impermissible state aid to a church school and thus was an establishment of religion or whether it was merely state aid to individual students. But such an inquiry is not helpful here since Mississippi cannot constitutionally help either schools or

pupils maintain or attend racially segregated schools with tax money. *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958). Mr. Justice White pointed to the difference between considerations involved in establishment of religion cases and racial discrimination cases in his concurring opinion in *Lemon* v. *Kurtzman*, 403 U.S. 602, 671, n. 2 (1971):

> As a postscript I should note that both the federal and state cases are decided on specified Establishment Clause considerations, without reaching the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional.

Finally, the district court's holding requiring appellants to prove textbook aid vital to segregationist academies imposes an impossible burden of proof. For neither in the tuition grant or the tax exemption cases was there any evidence that whites would return to public schools if only tuition grants or tax benefits were withdrawn. And since the private academies have grown in number and size recently, rather than retreated, the standard approved by the district court would argue for the restoration of tuition grants and tax benefits to the academies of Mississippi. The absurdity of this result and the authorities cited above are sufficient answer to the standard the district court would impose upon plaintiffs in cases such as this.

The need to provide an effective remedy for the state's historic alignment with racial segregation leads us to still another fundamental principle controlling in this case:

> The constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive officers, nor nullified by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." *Cooper* v. *Aaron*, 358 U.S. 1, 17 (1958).

One such "ingenious or ingenuous" method used by states to circumvent their duty under *Brown*, is to support private persons in efforts which they cannot directly undertake. Such a scheme was at the foundation of an Alabama tuition grant statute and resulted in a holding that "it is axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458, 475-76 (M.D. Ala. 1967), affirmed *sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967). It should be axiomatic that the State of Mississippi, restrained from directly operating a segregated school system, cannot give financial support or basic educational resources—textbooks—to privately operated segregated schools. *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted, and the judgment below should be reversed.

Respectfully submitted,

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Appendix A

ENTERED: APRIL 18, 1972

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
CIVIL ACTION NO. WC70-53K

DELORES NORWOOD, ET AL.,

Plaintiffs,

—v.—

D. L. HARRISON, SR., ET AL.,

Defendants.

(April 17, 1972)

Before COLEMAN, Circuit Judge, and KEADY and SMITH, District Judges.

OPINION OF THE COURT

COLEMAN, Circuit Judge:

I

The Nature of the Case

This suit, a class action by Negro children attending the public schools, is brought through their parents as next friends.

The defendants are the members of the Mississippi State Textbook Purchasing Board and the Executive Secretary of that Board.

The gravamen of the complaint is that:

"Under the laws of the State of Mississippi, defendants select, purchase, distribute, loan and otherwise

dispose of textbooks, in behalf of the State of Mississippi, for the use of children enrolled in the elementary and secondary schools in the State of Mississippi (Miss. Code Anno. Sections 6634 et seq.) * * *.

"Beginning with the 1964-65 school term * * * when the first school districts in Mississippi were required to integrate under freedom of choice * * * and through the present, numerous private schools and academies have been either formed or enlarged, which schools have established as their objective and/or have had the effect of affording the white children of the State of Mississippi racially segregated elementary and secondary schools as an alternative to racially integrated and otherwise non-discriminatory public schools.

"The defendants have provided these racially segregated schools and academies and the students attending such schools, either through sale or loan, textbooks purchased and owned by the State of Mississippi and have thereby provided state aid and encouragement to racially segregated education and have thereby impeded the establishment of racially integrated public schools in violation of plaintiffs' rights assured and protected by the Fourteenth Amendment to the Constitution of the United States."

Plaintiffs thus assert that defendants' lending of state-owned textbooks to children now attending racially segregated private schools situated within the State of Mississippi is violative of plaintiffs' Fourteenth Amendment rights and constitutes illegal state aid to racially segregated education. Plaintiffs emphasize that they do not challenge the right of students attending private schools, either sectarian or nonsectarian, to receive state-owned

textbooks so long as the schools they attend were not organized in the wake of public school desegregation and do not engage in racially discriminatory admission practices, but as to students attending schools of the latter category, their claim is that the state may not validly provide them with free textbooks.

Plaintiffs pray an order requiring an accounting by defendants of all textbooks purchased from the State of Mississippi or on loan from the State of Mississippi to private schools and students enrolled therein; that defendants be directed immediately to recall, and otherwise assure the return to state depositories, of all textbooks used by students in attendance at private schools which have already been adjudged by other United States Courts as racially segregated and which have been formed for the purpose of providing white students with an alternative to racially integrated, non-discriminatory public schools; that the defendants be enjoined from further sale or distribution of such textbooks to any private schools or students enrolled therein without first notifying plaintiffs and obtaining court approval; and that defendants be enjoined from distributing state-owned textbooks to any private schools or students enrolled therein without first establishing that the school is racially integrated and has not had the effect of frustrating or impeding the establishment of racially integrated public schools.

Subject matter jurisdiction, not contested, is predicated upon 42 U.S.C., §1983 and 28 U.S.C., §1343(3) and (4).

II

Three-Judge Court Jurisdiction

Subsequent to the original filing of the complaint, plaintiffs submitted the following motion:

"Plaintiffs, pursuant to Jackson v. Choate, 404 F.2d 910 (5th Cir., 1968), respectfully move this Court to certify this cause to the Chief Judge of the United States Court of Appeals for the Fifth Circuit to convene a Three-Judge District Court pursuant to 28 U.S.C., §§2281, 2284.

"We further move that the Three-Judge District Court thereafter determine whether this action should be litigated before it or a single district court judge."

In response thereto, the managing District Judge concluded that the complaint called for the convening of a Three-Judge District Court in accordance with 28 U.S.C., §2284, and requested the Chief Judge of the Circuit to constitute a Court as contemplated by the statute. Thereafter, the Court was constituted.

The present views of the plaintiffs to the contrary notwithstanding, the Court is of the opinion that, sitting as a Three-Judge District Court, it has jurisdiction of this controversy.

Title 28, U.S.C., §2281, provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the constitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under §2284."

To authorize the convention of a Three-Judge Court the controversy must possess the following characteristics:

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(1) the constitutional question raised must be substantial; (2) a state statute or administrative order of general statewide application must be assailed as unconstitutional; (3) a state officer must be party defendant; and (4) injunctive relief must be sought. Idlewild Bon Voyage Liquor Corporation v. Epstein, 1962, 370 U.S. 713, 82 S.Ct. 1294, 8 L.Ed.2d 794; Hall v. Garson, 5 Cir., 1970, 430 F.2d 430, 442-443; Moore's Federal Practice, 1 A., §0.205; C. A. Wright, Law of Federal Courts, §50 at 189 (2nd Ed. 1970).

This case meets these tests.

An injunction is sought against the enforcement by state officials of a state statute, §§6634, et seq., Mississippi Code, 1942,[1] and Board regulations.[2] The contention is

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[1] Section 6641(1)(a) Mississippi Code of 1942:

"The board shall have the power and is hereby authorized: (a) To promulgate rules and regulations for the purchase, care, use, disposal, distribution, and accounting for all books to be furnished under the terms of this Act and to promulgate such other rules as may be necessary to the proper administration of this Act."

Section 6656 Mississippi Code of 1942:

"Plan. This Act is intended to furnish a plan for the adoption, purchase, distribution, care and use of free textbooks to be loaned to the pupils in all elementary and high schools of Mississippi.

"The books herein provided by the board shall be distributed and loaned free of cost to the children of the free public schools of the state, and all other schools located in the state, which maintain educational standards equivalent to the standards established by the state department of education for the state schools."

[2] The regulation for distribution of state-owned textbooks from 1940 through 1970 provided as follows:

"For the distribution of free textbooks the local control will be placed in the hands of the County Superintendent of Education. All requisitions for books shall be made through him and all shipments of books shall be invoiced through him. At

that although the statute requires the free lending of textbooks to *all educable children*, it should not include those attending private racially segregated schools. Plaintiffs say that they do not object to other educable children receiving the books. Thus it is argued that they are not claiming the statute to be altogether unconstitutional but they are only challenging the constitutionality of its application. Since, however, the statute specifically provides that *all* children shall receive the books and this Court has no authority to amend that language, we must consider the complaint as an attack on the statute as written. Our jurisdiction, of course, extends to a consideration of whether a facially valid statute has been unconstitutionally applied by officers in charge of its enforcement.

As to substantiality, see Ex Parte Poresky, 1933, 290 U.S. 30, 32; 54 S.Ct. 3, 4; 78 L.Ed. 152, 153; Local Union

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his discretion he may set up certain regulations governing the distribution of books within the county, such regulations not to conflict with the regulations adopted by the State Textbook Board or provisions of the Free Textbook Act."

The above regulation was revised on October 14, 1970, to read as follows:

"*Public Schools.* The administration of the textbook program in the public schools shall be the responsibility of the administrative heads of the county units, consolidated districts, and municipal separate districts set up by the Legislature. All textbook transactions between the public schools and the State shall be carried on through them. It shall be the duty of these local custodians to render all reports required by the State; to place orders for textbooks for the pupils in their schools; . . .

"*Private Schools.* Private and parochial school programs shall be the responsibility of the State Textbook Board. All textbook transactions will be carried out between the Board and the administrative heads of these schools. Their duties shall be the same as outlined above for public schools."

No. 300, Amalgamated Meat Cutters & Butchers Workmen of North America, AFL-CIO v. McCulloch, 5 Cir., 1970, 428 F.2d 396, 399-400.

Contrary to the position taken by defendants, we hold that these plaintiffs, black children who are attending the public schools, have standing to prosecute this complaint, Chance v. Mississippi Textbook Rating Board, 1941, 190 Miss. 453, 200 So. 706; Association of Data Processing Service Organizations, Inc. v. Camp, 1970, 397 U.S. 150; Barlow v. Collins, 1970, 397 U.S. 159.

III

The Merits

Near the close of the Great Depression, Governor Paul B. Johnson, Sr. on January 16, 1940, delivered his Inaugural Address to a joint session of the Mississippi Legislature.[3] He said that 75,000 children in Mississippi were without textbooks, that all states surrounding Mississippi gave free textbooks to each child in those states, that the failure to provide free textbooks to the children of Mississippi was "an indictment of our state government", and that the State should furnish free textbooks to all educable children in the elementary grades.

The result of this appeal was the enactment of Chapter 202 of the General Laws of the State of Mississippi of 1940, approved February 16, 1940, now codified as indicated supra, by which a textbook purchasing board was established. The board was cloaked with authority to select, purchase, distribute, and care for *free textbooks* in *all* schools in the State, through the first eight grades.

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[3] Mississippi House Journal, 1940, page 42.

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In his message to the Legislature on January 7, 1942,[4] Governor Johnson recommended that the free textbook program be extended to high school students. This resulted in the enactment of Chapter 152 of the General Laws of Mississippi of 1942, approved March 23, 1942, also codified as above, by which the program was extended to include high school students.

The program had not long been in existence, however, before a state court suit was filed to enjoin the Textbook Purchasing Board from distributing free textbooks to private and sectarian schools. This was a taxpayers' suit, complaining that textbooks were about to be requisitioned by and loaned to pupils in thirteen private elementary schools, all of which were sectarian, and that the issuance of such books for the free use of students in sectarian schools would be a violation of §208 of the Mississippi Constitution of 1890.

Section 208 provides that:

> "No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school."

In a 5-1 decision, the Supreme Court of Mississippi upheld the legality and the constitutionality [under §208] of providing free textbooks to students in private, sectarian institutions.

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[4] Mississippi House Journal, 1942, page 52.

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In an opinion written by the late [and we may justifiably say, great] Justice Julian P. Alexander, Sr., the Mississippi Supreme Court spoke the following:

> "Although the act allows the loaning of such books to pupils in properly qualified private elementary schools, whether sectarian or not, the sectarian character of some of the schools whose pupils would be loaned school books is vigorously stressed in complainant's brief and argument, and some alarm is confessed by counsel lest this legislation be viewed otherwise than as a threat to the mutual independence of church and state.
>
> "The bases for such anxiety are founded upon considerations which bulked large in the minds and hearts of those who founded our republic, and who, in order to insure domestic tranquility and secure the blessings of liberty, established its Constitution with its restrictions, and the flag, which it follows, with its freedom.
>
> "Freedom of conscience was one of the blessings of liberty sought to be secured by constitutional separation of church and state. These principles are historical and fundamental. Yet it is quite true that while liberty is to be maintained at the price of eternal vigilance, such vigilance should include within its scope the common welfare of those who have the right to view educational opportunity as one of the 'blessings of liberty'.
>
> * * * * *
>
> "There is no requirement that the church should be a liability to those of its citizenship who are at the same time citizens of the state, and entitled to privileges and benefits as such. Nor is there any require-

ment that the state should be godless or should ignore the privileges and benefits of the church. Indeed, the state has made historical acknowledgment and daily legislative admission of a mutual dependence one upon the other.

"It is the control of one over the other that our Constitution forbids. Sections 18, 208. The recognition by each of the isolation and influence of the other remains as one of the duties and liberties, respectively, of the individual citizen. It is not amiss to observe that by too many of our citizens the political separation of church and state is misconstrued as indicating an incompatibility between their respective manifestations, religion and politics. The state has a duty to respect the independent sovereignty of the church as such; it has also the duty to exercise vigilance to discharge its obligation to those who, although subject to its control, are also objects of its bounty and care, and who, regardless of any other affiliation are primarily wards of the state. The constitutional barrier which protects each against invasion by the other must not be so high that the state in discharging its obligation parens patriae, cannot surmount distinctions which, viewing the citizens as a component unit of the state, become irrelevant.

"The religion to which children of school age adhere is not subject to control by the state; but the children themselves are subject to its control. If the pupil may fulfill its duty to the state by attending a parochial school it is difficult to see why the state may not fulfill its duty to the pupil by encouraging it 'by all suitable means'. The state is under duty to ignore the child's creed, but not its need. It cannot control

what one child may think, but it can and must do all it can to teach the child how to think. The state which allows the pupil to subscribe to any religious creed should not, because of his exercise of this right, proscribe him from benefits common to all.

"If the safety of the republic is to remain the supreme law, the safety and welfare of the citizens who compose it must remain supreme. In obedience to this duty the state may and should supply the child with protection against physical disease and danger, and under our Constitution must encourage the promotion of intellectual and moral improvement. Such benefits once made available by the state, may be demanded by the citizen or by any group of citizens.

* * * * *

"Calm reason must not be stampeded by random cries of church or state or sectarian control, or by the din from the conflict of catechism and dogmatism. A wholesome sanity must keep us immune to the disabling ptomaine of prejudice. If throughout the statute there are words which arrest the attention of oversensitized suspicion and are seen by a jaundiced eye as symptoms of secular control, one may regain composure by viewing the state's book depository as a great public libary of books available to all, which sells any books to anybody, and which, subject to reasonable regulation, allows the free use thereof to any child in any school. Cf. ch. 289, Laws 1938.

* * * * *

"We are of the opinion that the appropriation in chapter 18 of the Laws of 1940 was not a use or diversion of school or other educational funds as

contemplated by section 208, Mississippi Constitution of 1890, nor did it become a part thereof. The appropriation for schools is entirely separate, ch. 17, Acts of 1940. The use of the textbook fund constitutes no charge against any public school funds, properly so called, nor against any trust funds available for particular schools or educational purposes. Such funds are not appropriated 'toward the support of any sectarian school', nor does the furnishing of such books to the pupils in properly qualified private schools constitute a pledging or loaning of the credit of the state 'in aid of any person, association, or corporation' in contravention of section 258 thereof. The books belong to, and are controlled by, the state; they are merely loaned to the individual pupil therein designated; their preservation is fostered by exaction of suitable compensation for their loss or damage; the duty of protection through fumigation against contagion by use is assumed by the state.

* * * * *

"Nor is the loaning of such books under such circumstances to the individual pupils a direct or indirect aid to the respective schools which they attend, although school attendence is compulsory. Such pupil is free to attend a proper public or private school, sectarian or otherwise."

The judgment of the Chancery Court of Hinds County, Mississippi, denying the injunction, was affirmed. Chance v. Mississippi Textbook Rating Board, 1941, 190 Miss. 453, 200 So. 706.

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This 1941 decision of the Supreme Court of Mississippi seems generally to be in accord with one delivered twenty-seven years later by the Supreme Court of the United States in Board of Education of Central School District No. 1 v. Allen, 1968, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060.

In that case a New York statute requiring school districts to purchase and loan textbooks to students enrolled in parochial as well as in public and private schools was under constitutional attack. The Supreme Court held that the New York statute did not constitute a "law respecting an establishment of religion or prohibiting the free exercise thereof" in conflict with the First and Fourteenth Amendments to the Constitution of the United States. We quote from the opinion in *Allen*, supra:

> "Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), is the case decided by this Court that is most nearly in point for today's problem. New Jersey reimbursed parents for expenses incurred in busing their children to parochial schools. The Court stated that the Establishment Clause bars a State from passing 'laws which aid one religion, aid all religions, or prefer one religion over another', and bars, too, any 'tax in any amount, large or small • • • levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion'. 330 U.S., at 15-16, 67 S.Ct., at 411. Nevertheless, said the Court, the Establishment Clause does not prevent a State from extending the benefits of state law to all citizens without regard for their religious affiliation and does not prohibit 'New Jersey from spending tax-

raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools'. The statute was held to be valid even though one of its results was that 'children are helped to church schools' and 'some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets'. 330 U.S., at 17, 67 S.Ct., at 512. As with public provision of police and fire protection, sewage facilities, and streets and sidewalks, payment of bus fares was of some value to the religious school, but was nevertheless not such support of a religious institution as to be a prohibited establishment of religion within the meaning of the First Amendment.

* * * * *

"The express purpose of §701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. *The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.* Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution." [Emphasis ours].

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To be specific, the racial identity of the child had nothing to do with a the original enactment of the Mississippi statute nor has it had anything to do with the receipt of a free textbook throughout a period of more than thirty years. Every Mississippi school pupil, before and since 1954, the date of *Brown* v. *Board of Education*, whether enrolled in public, private, or parochial schools, of whatever race, has received the free textbooks without question or impediment.

Plaintiffs say, however, that furnishing the textbooks free to those students who now choose to attend racially segregated private schools, established in Mississippi since 1964 for the purpose of affording a child an opportunity of not attending integrated public schools, is unconstitutional because it conflicts with the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch", Green v. County School Board of New Kent County, 1968, 391 U.S., at 437.

In line with this position plaintiffs say (Brief, p. 25) "We challenge this statute to the extent that it requires or authorizes the distribution of state-owned textbooks to schools formed for the purpose of having the effect of providing whites with an alternative to public integrated education."

The evidence establishes that 34,000 students are presently receiving state-owned textbooks while attending 107 all-white, nonsectarian private schools which have been formed throughout the state since the inception of public school desegregation.[5] This number is to be compared

[5] An additional 8,000 students are enrolled in 41 private, nonsectarian schools which do not participate in the state textbook program.

with 534,500 students in more than 1,000 public schools and 12,100 students in desegregated parochial schools who are receiving free textbooks. It is plain, however, that the books have not been issued to the schools but to the students. As in the case of public schools, private and sectarian school authorities are held responsible for the books as a matter of orderly administration. The statute does not authorize the distribution of the books to schools, only to pupils.

We are thus brought to the point of determining whether the state's furnishing of free textbooks to students attending racially segregated schools is a support of such schools, for whose promotion and encouragement public funds, of course, may not be constitutionally provided. In terms of the unequivocal prohibition contained in the First Amendment, made applicable to the states by the Fourteenth Amendment, the question has been clearly settled. Free textbooks to the students is not a financial benefit to the church-related schools, as held in *Allen*, and is not a direct or an indirect aid to such schools, as held in *Chance*. In the recent case of Lemon v. Kurtzman, 403 U.S. 603, 29 L.Ed.2d 745, the United States Supreme Court continued to recognize the distinction between permissible state aid to the student and impermissible state aid to the church-related school, and invalidated a Pennsylvania statute which undertook to provide financial aid directly to church-related schools.

The essential inquiry, therefore, is whether we should apply a more stringent standard for determining what constitutes state aid to a school in the context of the Fourteenth Amendment's ban against denial of the equal protection of the law than the Supreme Court has applied in First Amendment cases. On the record made before us

we perceive neither the logic nor the necessity for applying any different test to a universally free school textbook program.

Plaintiffs rely primarily upon Coffey v. State Educational Finance Commission, 296 F. Supp. 1389 (S.D., Miss., 1969); Poindexter v. Louisiana Financial Assistance Commission, 275 F. Supp. 833 (E.D., La., 1967); Griffin v. State Board of Education, 296 F. Supp. 1178 (E.D., Va., 1969); and Green v. Kennedy, 309 F. Supp. 1127 (D.C., 1970), appeals dismissed for want of jurisdiction, *sub nom.* Cannon v. Green, 398 U.S. 956 (1970), and Coit v. Green, 400 U.S. 986 (1971); continued as Green v. Connally, 330 F. Supp. 1150 (D.C., 1971); affirmed *sub nom.* Coit v. Green, —— U.S. ——, 92 S.Ct. 564 (1971). These cases, which are clearly distinguishable on their faces, are not in point on the present issue.

In *Coffey* it was held that state tuition grants to students attending private segregated schools, first begun in 1964, and which in three years time was followed by an increase in private nonsectarian schools from three to forty eight in number, were "critical to most of the schools", 296 F. Supp. at 1392. The Court further found "that the tuition grants have fostered the creation of private segregated schools • • • encourages, facilitates, and supports the establishment of a system of private schools operated on a racially segregated basis as an alternative available to white students seeking to avoid desegregated schools • • • and that grants 'tend in a determinative degree to perpetuate segregation' ". Therefore, the grants, and the Mississippi statute which authorized them, were struck down as violative of the equal protection clause of the Fourteenth Amendment.

The Court further pointed out:

> "There is no claim in this case that the Constitution requires all children to attend public schools, or that a private citizen may not select a private segregated school for his child because of a desire to keep the child from being educated with children of a different race. What is involved here are legislative enactments which 'will significantly encourage and involve the State in private discriminations'. Reitman v. Mulkey, 387 U.S. 369, 381, 87 S.Ct. 1627, 1634, 18 L.Ed.2d 830, 838 (1967)."

Similar tuition grant cases from other states are collated in Footnote 1 to *Coffey*, 296 F. Supp., at 1390, and will not be cited here.

Similarly in *Poindexter* a statute providing for tuition grants to pupils attending private segregated schools was invalidated. The Court held that any *affirmative* and *purposeful* state aid promoting private discrimination violates the equal protection clause, a state cannot legitimately be just a little bit discriminatory, and that the object or purpose of legislation is to be determined by its natural and reasonable effect. In speaking for the Court, Judge Wisdom wrote:

> "* * * any aid to segregated schools that is the product of the State's purposeful policy of fostering segregated schools and has the effect of encouraging discrimination is significant state involvement in private discrimination. (We distinguish therefore, state aid from tax benefits, free school-books, and other products of the State's traditional policy of benevolence toward charitable and educational institutions)." 275 F. Supp. 854.

The United States Supreme Court affirmed, 389 U.S. 571, 88 S.Ct. 693, 19 L.Ed.2d 780 (1968).

The result of this decision was that Louisiana enacted a revised tuition grant law. This statute, too, was invalidated by a subsequent Three-Judge Court. Poindexter v. Louisiana Financial Assistance Commission, 296 F. Supp. 686. Judge Wisdom again wrote:

> "The free lunches and textbooks Louisiana provides all childen in public and private schools are the fruits of a benevolent racially neutral policy."

Again the United States Supreme Court affirmed, 393 U.S. 17 (1968).

In *Griffin*, a three-judge district court invalidated Virginia's statute allowing tuition grants to children attending segregated schools. Expressly adopting Judge Wisdom's reasoning in *Poindexter*, the Court held the statute impermissibly provided for payments to children who may expend such funds for a segregated classroom, thereby "giving life to an educational forum decried by the Federal Constitution." 296 F. Supp. at 1181.

The tuition grant cases, which emphasize the financial support thereby afforded to educational instituitons, rest upon wholly different considerations from the case sub judice. Here we are concerned only with the act of furnishing a state-owned textbook to the student.

Finally the *Green* case, upon which plaintiffs place great reliance, involved the grant of federal tax exempt status and deductibility of contributions to *private segregated schools* in Mississippi. The *Green* Court emphasized that, apart from tax exemption to the schools, the deductions from income taxes by individuals and corporations who make contributions to racially segregated private schools

amounted to substantial and significant governmental support for the segregated private school pattern. Thus the exemptions were held invalid as against federal public policy without reaching constitutional issues.

We find no federal decision which has suggested the invalidation of the beneficient policy of a state to furnish textbooks to all of the educable children within its borders. To the contrary, under settled case law, the state's legitimate interest in the education of its youth, in whatever school the student or his parents may select, is a proper and adequate basis upon which the state may administer its free textbook program.

It has already been demonstrated that in Mississippi the free textbook program began without racial motivation and the books have long been uniformly supplied to all children alike, regardless of race, in both public and private schools. Only one prerequisite must be satisfied for the student who attends a private school, i.e., the school shall maintain educational standards equivalent to those established by the State Department of Education for public schools. In fact, plaintiffs concede that Mississippi has historically maintained a benevolent and racially neutral policy in the administration of its state-owned textbook program.

We find it wholly illogical to require an alteration in the state's textbook program simply because of the advent of more private schools following the desegregation of the public school system. Depriving any segment of school children of state-owned textbooks at this point in time is not necessary for the establishment or maintenance of state-wide unitary schools. Indeed, the public schools which plaintiffs acknowledge were fully established as unitary schools throughout the state no later than 1970-71, continue

to attract 90% of the state's educable children. There is no showing that any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools, now unitary. We are mindful of the fact that children are free to attend private schools of their choice, for whatever reason satisfactory to them and to their parents. See the concurring opinion of Mr. Justice Brennan in Abington School District v. Schempp, 374 U.S., at 242 (1963).

There could be considerable doubt about the constitutionality, under the equal protection clause, of a program which would provide free books to some children while denying them to others. Providing schools to some children and denying others access to those schools solely for racial reasons was held invalid in Brown v. Board of Education, *supra*.

Plaintiffs say that furnishing the free textbooks to pupils in private schools encourages attendance at such institutions. This, of course, is conjectural, as there is no substantial proof on that score. It occurs to us, however, that if encouragement alone is a sufficient test and if impermissible encouragement necessarily follows from the issuance of the books and subsequent attendance at a particular school, then the books may not be issued to those attending private sectarian schools (something which the Supreme Court has thus for declined to invalidate).

Since the issuance of free textbooks to students attending private schools has failed to defeat the establishment of a state-wide unitary school system in Mississippi, and since plaintiffs are themselves receiving their free textbooks, there is serious question as to whether plaintiffs are threatened with the irreparable injury which is prerequisite to injunctive relief. Federal judicial power is to

be exercised to strike down legislation, whether state or federal, only if a plaintiff is himself immediately harmed, or immediately threatened with harm, by the challenged action, Poe v. Ullman, 1961, 367 U.S. 497, 504.

Lurking beneath all this is the principle that two wrongs do not make a right. Punitive action against the children now receiving free textbooks in the private schools will do nothing to cure acts committed by others (not children) in the years now dead and gone.

We hold that the free textbook program and the Mississippi statutes authorizing it, for the consideration herein recited, are not constitutionally invalid.

This opinion constitutes both our findings of fact and conclusions of law.

The complaint is dismissed and judgment will be entered accordingly.

/s/ Jas. P. Coleman
United States Circuit Judge

/s/ William C. Keady
United States District Judge

/s/ Orma R. Smith
United States District Judge

Appendix A

ENTERED: April 18, 1972

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

CIVIL ACTION NO. WC70-53K

DELORES NORWOOD, ET AL.,

Plaintiffs,

—VS.—

D. L. HARRISON, SR., ET AL.,

Defendants.

JUDGMENT

This cause having been submitted upon the pleadings and oral and documentary proof, and after arguments of counsel and submission of memorandum briefs, and the court having concluded for the reasons set forth in its opinion this date released that the complaint is without merit and should be dismissed; it is

ORDERED

(1) All relief sought by plaintiffs be, and the same is hereby denied.

(2) The complaint is finally dismissed with prejudice.

All costs are taxed to plaintiffs.

This 17th day of April, 1972.

/s/ WILLIAM C. KEADY
United States District Judge

FOR THE THREE JUDGE COURT

Appendix A

ENTERED: May 16, 1972

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

CIVIL ACTION No. WC70-53K

DELORES NORWOOD, ET AL.,

Plaintiffs,

—v.—

D. L. HARRISON, SR., ET AL.,

Defendants.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that plaintiffs Delores Norwood, Andrew Galloway and Van Siggers, pursuant to 28 U.S.C. §1253, enter an appeal to the Supreme Court of the United States from the judgment and opinion of this three-judge district court dated April 17, 1972 and entered April 18, 1972.

Appendix A

Dated: May 15, 1972.

MELVYN R. LEVENTHAL
FRED L. BANKS, JR.
REUBEN V. ANDERSON
538½ North Farish Street
Jackson, Miss. 39202

JACK GREENBERG
Suite 2030
10 Columbus Circle
New York, N. Y. 10019

Attorneys for Plaintiffs

Appendix A

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 1972, I caused to be served by United States mail, postage prepaid, a copy of the foregoing Notice of Appeal upon Honorable William A. Allain, Assistant Attorney General, P. O. Box 220, Jackson, Mississippi 39205.

/s/ REUBEN V. ANDERSON
Attorney for Plaintiffs

Appendix B

ARTICLE 32

TEXTBOOKS

§ 6634. Mississippi state textbook purchasing board established.—There is hereby established the Mississippi State Textbook Purchasing Board, which shall hereinafter be referred to in this act as the board. Said board shall consist of five members, the governor who shall be ex-officio chairman, the state superintendent of education, and three members to be appointed by the governor, one from each of the three supreme court districts, who shall serve for a period of four years. In case of a vacancy during the administration for which they are appointed, the governor shall appoint a member or members to fill only the unexpired term. Each appointed member of the board shall be an educator of known character and acknowledged ability in his or her profession, with at least five years of successful teaching or supervisors experience in the public schools of Mississippi immediately previous to his or her appointment, and in addition thereto, shall be a qualified elector of his or her supreme court district. He or she shall be at least thirty years old.

The board, at its first meeting, shall elect an executive secretary who has proven business ability, whose duty it shall be to keep the minutes of the board, a complete record of all the proceedings of the board, and shall keep, file and preserve all documents, papers and records of the board, and shall perform such other duties as may be prescribed by the board. Said executive secretary shall enter into bond in the sum of $10,000.00 payable to the state of Mississippi, conditioned upon the faithful performance of his duties, and the proper and accurate ac-

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counting for all funds of every nature that may come into his hands or under his control under the provisions of this act.

Three members shall constitute a quorum for the transaction of all business.

SOURCES: Laws, 1940, ch. 202; 1942, ch. 152; 1946, ch. 444, § 1.

§ 6635. Oath of office.—Each appointive member of the board and its executive secretary, before entering upon the discharge of his or her duties shall take, subscribe, and file with the secretary of state the following oath to be administered by an officer authorized to administer oaths:

"I, ..., do solemnly swear, (or affirm) that I will faithfully discharge my duties as required by law, uninfluenced by any factor except a sincere desire to promote the best educational interest of Mississippi. So help me God."

SOURCES: Laws, 1940, ch. 202.

§ 6636. Members of board not to be personally or pecuniarily interested.—No person who has acted as an agent for any author or textbook publishing house, or an attorney for any author or textbook publishing house, or who has been an author or associate author of any textbook published by any textbook publishing house, or who owns stock in any textbook depository or any publishing house, or who has been directly or indirectly concerned in the authorship of any textbook, or directly or indirectly connected in any way with any textbook publishing house, shall be eligible to appointment on the Mississippi state

textbook rating and purchasing board. Any contract entered into in violation of this section shall be void.

SOURCES: Laws, 1940, ch. 202.

§ 6637. Publishers not to approach or make offers to members of board.—It shall be unlawful for any publisher, author, person, firm, company or corporation who deals in books, or any of their representatives, to offer, either directly or indirectly, any kind of employment of any pecuniary connection to any member or members of said board during their tenure of appointment.

SOURCES: Laws, 1940, ch. 202.

§ 6638. When members of board shall be disqualified to vote.—If any person related within the third degree by blood or marriage, as computed by civil law, to any member of the board, or if any person that is associated in any business or partnership with any member of said board, shall be employed in good faith by any school book company, firm, corporation or agent in connection with the adoption of textbooks within this state, the said member of said board so related by blood or marriage, or so associated in business or partnership with such person, shall not vote in the rating and adoption of any school book or books offered by such school book company, firm, corporation or agent for adoption.

SOURCES: Laws, 1940, ch. 202.

§ 6639. Compensation of the appointive members of the board and secretary to the board.—The governor and state superintendent of education shall serve without extra compensation. Each appointive member of the board shall receive ten dollars per day for each day in active service of

the board, not to exceed sixty days per year, and, in addition thereto, ten cents (10c) per mile one way for each mile actually traveled, by the shortest traveled route, from home to the place of meeting.

The salary of the executive secretary shall be set by the board and all necessary traveling expense shall be approved by the board. The annual salary and travel expense, however, shall not exceed that allowed by the legislature for the director of a division in the state department of education, and shall be subject to all other provisions governing the same. The salary, per diem, and travel expense shall be paid out of the state textbook fund provided herein. The board shall have authority to provide necessary help, clerical assistance and supplies for the executive secretary, to be paid out of the state textbook fund, within the limits prescribed in this act.

SOURCES: Laws, 1940, ch. 202; 1948, ch. 304, § 1; 1950, ch. 373, eff July 1, 1950.

§ 6640. Meeting—time and place.—The board shall meet at such time and place as shall be designated by the chairman or by a majority of said board.

SOURCES: Laws, 1940, ch. 202.

§ 6641. Powers and duties of board.

1. The board shall have the power and is hereby authorized:

(a) To promulgate rules and regulations for the purchase, care, use, disposal, distribution, and accounting for all books to be furnished under the terms of this Act and to promulgate such other rules as may be necessary for the proper administration of this Act.

Appendix B

(b) To adopt, contract for, and purchase, cash or credit, basal textbooks through twelve grades as provided in the school curriculum, or any other course or courses that they may add thereto.

(c) To determine the period of contract for rated and adopted textbooks shall not be for less than four years and not exceeding five years, with the right of the board in its discretion to renew or extend such contract from year to year for a period not exceeding two additional years, the conditions of the approval or forfeiture of a contract and other terms and conditions as may be necessary and not contrary to law. No contract shall be valid and binding until and unless approved by the Governor.

(d) For the purpose of assisting the board during an adoption, there shall be rating committees in each of the fields in which textbooks are considered for adoption, and each committee shall be composed of seven members; the State Superintendent of Education shall appoint three (3) members of each of the committees, each of whom shall be a competent, experienced teacher or supervisor of instruction professionally trained in each of the fields in which textbooks are considered for adoption; the Governor of the State of Mississippi thereupon shall appoint four (4) members of each of said committees who shall be persons he deems competent to participate in the appraisal of books offered for adoption, in each field, for use in the public schools of this state. It shall be the duty of said rating committees to appraise the books offered for adoption in each field in which textbooks are offered for adoption and recommend three books for each adoption to be made by the board and giving the reasons for or basis of such recommendations. No book shall be recommended which does

not receive a majority vote of the members of each committee; any member or members dissenting from any majority vote of the committee shall make his or their appraisal of any book recommended or rejected by the majority of the committee and specify the reasons therefor and make such recommendations as he or they think proper. All appraisals, recommendations, and dissents if any, shall be in writing and filed with the board for its consideration upon the adoption. The expenses of such committees shall be paid out of the State textbook fund provided herein. Such rating committees shall be subject to the regulations set forth in Sections 2, 3, 4, 5 and 6. The board shall have the power to reject any and all recommendations of the rating committees and to call for further recommendations; but in no case shall the board adopt any book not recommended by the rating committees.

(e) The board shall have complete power and authority over additions and amendments to textbooks, advertising and their contents, bids and proposals, prices of textbooks, specimen copies, cash deposits, selection and adoption, distribution, fumigation, emergencies, selling to others, return of deposits, forfeiture of deposits, regulations governing the deposit, forfeiture of contract, approval of contract, renovation and repair of books requisition, transportation or shipment of books, and any other Acts or regulations, not contrary to law, that may be deemed necessary for furnishing and loaning free textbooks to the school children, as provided in this Act. The board shall have full power to advertise for bids, to purchase, buy, and contract for all such basal textbooks through twelve grades as provided in this Act, and all contracts shall be approved by the Governor.

(f) It shall be the duty of the board to advertise for sealed bids, said bids to be opened at a meeting of the board at a date named in the advertisement. Bidders shall quote their lowest net wholesale prices, and net exchange prices, f.o.b. central depository, Jackson, Mississippi, or the board may, in its discretion, establish a state depository or depositories, or inaugurate any other plan for the distribution of books, and such prices must not be higher than the lowest price at which books are sold anywhere in the United States, after all discounts are allowed; and at any time that the board may find that any book or books, in either regular or special editions, are being furnished in any other state at a lower price under contract than it is being furnished in Mississippi, the contract shall be forfeited to the State, and any contractor who violates the provisions of this Section shall return all money paid out for such book or books and also forfeit said book or books to the State, and suit may be brought on the bond of the contractor for all losses sustained.

Successful bidders or contractors shall be required to maintain a depository at a place within the State of Mississippi, to be named by the board, where a stock of books sufficient to meet all reasonable and immediate demands shall be kept. Upon requisition of the board, the depository shall ship books, transportation charges paid, to the various shipping points in Mississippi to be specified by the board, and for such service the depository shall make no charge to the board except the actual cost of transportation from the depository to the shipping point designated; provided that the cost of distribution shall not exceed eight percent of the total appropriation for any fiscal year.

2. Any and all textbooks that may be furnished by the publisher thereof to any member of the above mentioned

rating committee without cost shall within one year after receipt of same by said member be turned in to the State School Book Depository without any cost to the State of Mississippi, and the same shall thereafter be used without any cost to the State of Mississippi in supplying free textbooks to the educable children of the State of Mississippi as now provided by law.

SOURCES: Laws, 1960, ch. 310.

§ 6642. Copies of bids, contracts, specimen books retained as public records.—Specimen copies of all textbooks, which have been made the basis of contracts under the provisions of this act, clearly marked and identified as such, shall be deposited by the publisher of said books with the state superintendent of education, said specimen copies shall be preserved and kept open for inspection by the public. All contracts and bonds executed under the provisions of this act shall be executed in triplicate, one copy for the contractor, one copy to be filed in the office of the secretary of state, and one copy to be filed in the office of the state superintendent of education. All contracts shall be approved by the governor. An original of each bid, whether accepted or rejected, shall be filed and preserved in the office of the state superintendent of education for at least five years. All books furnished the state of Mississippi by contractors under this act shall continue to measure up to the same standards as are required in the contract, said standards to include printing, binding, cover boards, mechanical makeup, and any other relevant points as set out in the plans and specifications as fixed by the board. Any contractor of any book or books, who fails to keep said books up to said standards, shall forfeit, not only his con-

tract to the state, but shall return all money paid out for such book or books and also forfeit said books to the state.

SOURCES: Laws, 1940, ch. 202.

§ 6643. Others may buy books.—Any parent, person or school board in any community of the state may purchase books from the county superintendent of education or depository, who is given authority to sell books under the provisions of this act; provided, that the price of the books so ordered or bought shall be paid in advance, said price to be the same as the contract price, plus whatever postage or delivery charges might accrue.

The county superintendent of education or depository shall keep a detailed record of all such sales and shall forward in quarterly payments all such funds received for books to the executive secretary to be placed to the credit of the state textbook fund. Said executive secretary shall furnish the county superintendent or depository with a receipt for the money received, and said county superintendent or depository shall keep such receipt as part of his public record.

SOURCES: Laws, 1940, ch. 202.

§ 6644. Anti-trust provision.—No book or books shall be purchased from any person, firm or corporation who is a member of, or connected with, any trust. In the event that it is established that this provision has been violated, the contract shall be forfeited and monies paid out under this contract shall be returned to the state, and all books heretofore purchased under said contract shall be kept by the state.

SOURCES: Laws, 1940, ch. 202.

Appendix B

§ 6646. Uniform textbooks—selection by local school authorities.

1. The State Textbook Board shall adopt and furnish textbooks only for use in those courses set up in the State course of study adopted by the State Board of Education, or courses established by special acts of the Legislature. In all subjects the board, in its discretion, may adopt five (5) textbooks from those recommended by professional committees, according to the State Textbook Law. The prices of books adopted shall not be higher than the lowest prices at which the same books are being sold anywhere in the United States. The State Textbook Board may adopt a plan which permits the local districts to choose the book or books to be requisitioned from those adopted, provided:

(a) That in selecting readers, the local district may be allowed to adopt two (2) from which each pupil enrolled may be furnished the equivalent of two (2) in such proportions as desired;

(b) That in selecting books for all other subjects, the local school districts may be allowed to select any adopted State textbook without being restricted to a single declared adoption when the governing authority of the district declares a policy of multiple adoptions and specifies the subject areas therefor, and further provided, that not more than one (1) of the books from the multiple adoption list shall be furnished to each pupil enrolled in a course;

(c) That when a book is furnished by the State, it shall remain in use during the period of its adoption;

(d) That school officials of separate school districts and of each system of county schools shall select the same book or books for all of its schools;

(e) That the average per pupil cost of textbooks so furnished any unit shall not exceed that allowed for all other units in the State; and

(f) That nothing herein provided shall be construed as giving any school the authority to discard or replace usable copies of textbooks now being furnished by the State.

2. Whenever any book under contract is displaced by a new adoption, the board may continue to require the schools to use such books until the stock owned by the State is exhausted, provided the period of use shall not exceed four (4) years.

SOURCES: Laws, 1966, ch. 421, § 1, eff from and after passage (approved May 31, 1966).

§ 6647. Agents designated.—Any person, firm or corporation with whom a contract has been entered into, under the provisions of this act, shall designate the secretary of state of Mississippi as its or their agent, upon whom citation and all other writs and processes may be served, in case any suit shall be brought against such person, firm or corporation.

SOURCES: Laws, 1940, ch. 202.

§ 6648. Textbook fund.—The state textbook fund of Mississippi shall consist of the amount or amounts appropriated by the legislature for same, together with all monies accruing from the sale of disused books, all monies derived from the purchase of books by both public and private school trustees, by private individuals, all monies collected in damage suits under the terms of this act, or any other monies collected in any way whatsoever under the terms of this act.

SOURCES: Laws, 1940, ch. 202.

§ 6649. Warrants.—Bills for textbooks purchased by the state on requisitions as provided herein, and bills for all other expenses incurred under the terms of this act, shall be paid by warrants on the state treasury made by the auditor on receipt of bills from the executive secretary, and approved by the board.

SOURCES: Laws, 1940, ch. 202.

§ 6650. Printed labels—book covers.—All books shall have printed labels on both inside covers. Each school shall number all books, placing the number on said labels. All teachers shall keep an accurate record of the number and names of all books issued to each pupil. All books must be covered by the pupils, under direction of the teacher, said covers to be furnished by the board.

SOURCES: Laws, 1940, ch. 202.

§ 6651. Penalty for school officers dealing in textbooks.—No teacher in any of the schools of the State, nor county or city superintendent of schools, nor any person officially connected with the government of or direction of any school shall, during the term of his office as said superintendent, or during the time of his or her employment as teacher, act as agent or attorney for any textbook publishing company selling textbooks in this state. If, after election as county or city superintendent, or employment as teacher, any person filling such position accepts the agency or attorneyship of any textbook publishing company, the acceptance of such agency or attorneyship shall work a forfeiture of the office or position as teacher held at the time of the acceptance of such agency or attorneyship.

SOURCES: Laws, 1940, ch. 202.

§ 6652. Executive secretary to deposit funds.—The executive secretary shall deposit all funds sent to him for lost or damaged books or any other funds accruing under this act to the state treasury to the credit of the state textbook fund.

SOURCES: Laws, 1940, ch. 202.

§ 6653. Suits.—Any loss occásioned by the neglect, carelessness, or failure of duty by the county superintendent or any principal or teacher in charge of any school, shall entitle the state to bring suit for the recovery of the amount of the loss or losses occasioned thereby.

Any writ or suit of any nature instituted under the provisions of this act shall be brought in the name of the state of Mississippi by the attorney general, and any money or moneys recovered by such suit shall be placed to the credit of the state textbook fund.

SOURCES: Laws, 1940, ch. 202.

§ 6654. Penalty for the violation of the provisions of this act.—Any person wilfully violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction shall be punished by fine of not more than five hundred dollars ($500.00), or not to exceed six months in the county jail, or both, in the discretion of the court.

SOURCES: Laws, 1940, ch. 202.

§ 6655. Constitutionality.—Should the courts declare any section or sections, sentence, clause, or any part of this act unconstitutional, such decision shall apply only to the section or sections, sentence, clause or part so declared

to be unconstitutional, and shall not apply to any other section or sections or any other part of this act.

SOURCES: Laws, 1940, ch. 202.

§ 6656. Plan.—This act is intended to furnish a plan for the adoption, purchase, distribution, care and use of free textbooks to be loaned to the pupils in all elementary and high schools of Mississippi.

The books herein provided by the board shall be distributed and loaned free of cost to the children of the free public schools of the state, and all other schools located in the state, which maintain educational standards equivalent to the standards established by the state department of education for the state schools.

Teachers shall permit all pupils in all grades of any public school to carry to their homes, for home study, the free text books loaned to them, and to carry to their homse, for home study, all other regular text books used in the public schools of the state whether they be free text books or not.

SOURCES: Laws, 1940, ch. 202; 1942, ch. 152; 1944, ch. 149, § 1.

§ 6657. Repeal.—All laws and parts of laws in conflict herewith shall be and are hereby repealed.

SOURCES: Laws, 1940, ch. 202.

§ 6658. When free textbooks to be furnished.—The free textbooks to be purchased and distributed for use in the high schools in the state as provided in this act shall be furnished to the pupils during each school session from and after July 1, 1942, but nothing contained in this act

shall be construed as requiring the board to furnish free textbooks for use in the ninth to twelfth grades, inclusive, during the 1941-42 school session.

SOURCES: Laws, 1940, ch. 202; 1942, ch. 152.

§ 6658-01. Storage of school books.—1. It shall be the duty of the board of supervisors of each county in the state to provide adequate storage space in the county courthouse, or in some other building at the county site, for the storage of school books, distributed under the provisions of chapter 202, laws of Mississippi, 1940, as amended by chapter 152, general laws of 1942 [§§ 6634—6658, Code of 1942]. In the event sufficient space for the storage of such books cannot be provided in the courthouse, the board of supervisors shall be authorized to rent a room or rooms in some other building at the county site for the storage of such books, and to pay such reasonable rental therefor as may be necessary out of the general fund of the county.

2. The county superintendent of education, with the approval of the county school board, may expend out of the county school fund an amount not to exceed one hundred and fifty dollars ($150.00) in any school year for part-time janitor's services or other help in the handling, storage, and distribution of school books.

SOURCES: Laws, 1946, ch. 464, §§ 1, 2.

§ 6658-02. Reports required from non-public schools receiving free textbooks.—1. The management of all private, parochial or denominational schools wherein the state textbook board is furnishing to the students thereof free school textbooks and said free school textbooks are used by the students in said school, shall file annually with

the county superintendent of education wherein said school is located on or before July 1 of each year a report showing the number of students receiving instruction, the number of students in regular attendance, the number of teachers employed and any other facts required by the state board of education as will show the grade, character and amount of educational work actually done in said school.

2. Any person required by this act to do so who shall refuse, neglect or fail to file the report herein required shall be guilty of a misdemeanor and upon conviction, shall be fined in a sum not to exceed twenty five dollars ($25.00).

3. All laws or parts of laws in conflict herewith be and the same are hereby repealed.

SOURCES: Laws, 1946, ch. 464, §§ 1, 2.

§ 6659. Advertising.—The Mississippi State Textbook Purchasing Board is hereby authorized, empowered, and directed, in its discretion, to offer for advertising purposes, the protective covers of the several free textbooks, to accept bids, to let contracts for said space; and the contracts for said advertising purposes shall be let for definite periods not to exceed two years.

It shall be the duty of the Mississippi State Textbook Purchasing Board, if it is desired that advertising shall be used, to approve all proposed advertising submitted for use on the covers of such free textbooks, to accept only that advertising which will be in keeping with the spirit of the schools in promoting the children physically, mentally, and morally; and the said Mississippi State Textbook Purchasing Board is hereby authorized, empowered,

and directed, in its discretion, to reject any and all bids submitted. Provided that no sectarian, un-American or immoral advertisements shall be accepted.

That all moneys derived from sale of such advertising be deposited in the state treasury for the benefit of the general fund.

Sources: Laws, 1940, ch. 194.

§ 6659.5. Mississippi Blue Book, purchase and distribution of.—1. The State Textbook Purchasing Board be and it is hereby authorized and empowered to purchase not to exceed seven thousand five hundred copies of the Mississippi Blue Book for supplementary use in the schools of Mississippi.

2. The Mississippi State Textbook Purchasing Board shall prescribe the number of copies to be furnished each school or make any other regulations governing its distribution and use.

3. The cost of the Blue Books purchased and distributed in excess of the number of copies now authorized by law shall be paid for out of the regular appropriation to the state textbook fund.

Sources: Laws, 1950, ch. 362, §§ 1-3.

Appendix C

(See Opposite) ☞

APPENDIX C[1/]

STATEWIDE ENROLLMENTS

	Private Non-Sectarian				Public	
	Total Enrollment	Change	# of Schools	Number of Schools Opened For First Time		Change
63-64	2,362		17		570,000	
64-65	2,408	+ 46	21	4	576,000	+6,000
65-66	3,841	+1,433	41	20	583,000	+7,000
66-67	5,452	+1,611	49	8	582,500	- 500
67-68	6,546	+1,094	58	9	582,500	---
68-69	9,064	+2,518	69	11	581,500	-1,000
69-70	30,939	+21,875	124	55	550,500	-31,000
t. 1970	42,000[2/]	+11,061	155	31	534,500	-16,000

[1/] This Appendix derives entirely from exhibit offered and received into evidence by supplemental order of district court.

[2/] Estimate based on stipulations; the exact figure lies somewhere between 41,000 and 43,000.

Appendix D

(See Opposite) ☞

PRIVATE NON-SECTARIAN ACADEMIES PARTICIPATING IN STATE'S TEXTBOOK PROGRAM[1] 1970-71

NAME OF SCHOOL[3]	NUMBER OF BOOKS	COST TO STATE	NUMBER OF STUDENTS[2]
1. Presbyterian Day School	264	$ 576.45	135
2. Chamberlain-Hunt Academy	829	3,398.82	360
3. Clarksdale Baptist	2356	5,937.45	427
4. First United Methodist	1305	3,029.25	169
5. Presbyterian Day School	1247	2,323.11	141
6. St. George's Episcopal	1340	2,885.54	169
7. Christ Episcopal Day School	2075	5,218.28	265
8. Woodland Hills Baptist Academy	2279	5,598.42	428
9. Heidelberg Baptist Academy	1993	5,557.50	295
10. Jesus Name Faith	85	170.70	44
11. St. John's Day School	1130	2,465.85	184
12. First Baptist Parochial	630	1,499.64	78
13. Sylvarena Baptist Academy	1671	4,255.77	236
14. Gospel Lighthouse Christian	119	472.95	22
15. Adams County Private	2513	8,327.34	1006
16. Adams County Christian	3452	8,918.07	535
17. Amite School Corporation	3950	11,875.26	581
18. Pine Hills Academy	1839	5,194.44	328
19. Gray Academy	1320	3,932.43	177
20. Shaw Educational Foundation	1480	4,443.00	905

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[1] This Appendix derives entirely from compilation filed by appellees in the district court

[2] All students (and all faculty members) are white except for "15 Chinese, 16 oriental, 2 Indians and 2 Latin American" students.

[3] The district court found that all of the "church schools" recorded herein are essentially non-sectarian and were formed in response to the desegregation of public schools.

PRIVATE NON-SECTARIAN ACADEMIES
PARTICIPATING IN STATE'S TEXTBOOK PROGRAM[1]
1970-71

NAME OF SCHOOL[3]	NUMBER OF BOOKS	COST TO STATE	NUMBER OF STUDENTS[2]
21. Calhoun Academy	294	$ 655.14	127
22. Carroll Academy	358	1,084.83	305
23. Chickasaw Academy	1420	3,586.17	164
24. Clarke Academy	387	1,478.04	340
25. Oak Hill Academy	2348	6,739.17	450
26. Pheba Academy	675	1,636.14	133
27. Happy Day School	652	884.73	110
28. Copiah Academy	2472	7,312.20	483
29. The Children's Academy	726	2,588.70	148
30. Union Private	1578	4,526.16	202
31. Sanford Academy	787	2,277.54	136
32. Covington School Foundation	512	1,494.36	75
33. J. A. Beeson Academy	1531	4,229.04	265
34. Kirk Academy	842	3,061.74	639
35. Grenada Lake Academy	2523	7,119.58	381
36. Westminister Academy	252	773.86	132
37. Bearss Academy	417	1,146.18	117
38. Jackson Academy	3071	6,652.56	575
39. Southwest Academy	1167	2,649.12	131
40. Terry Academy	1378	3,884.61	157
41. Central Holmes	3861	12,787.11	501
42. Cruger-Tchula Academy	2299	7,712.64	438
43. East Holmes Academy	2776	7,791.60	619
44. Four County Academy	815	1,905.90	76
45. Humphreys Academy	3480	10,000.71	398
46. Live Oak Academy	218	822.21	412

APPENDIX B

PRIVATE NON-SECTARIAN ACADEMIES
PARTICIPATING IN STATE'S TEXTBOOK PROGRAM[1]

NAME OF SCHOOL[3]	NUMBER OF BOOKS	COST TO STATE	NUMBER OF STUDENTS[2]
47. Claiborne Educational Foundation	2032	$ 4,792.38	253
48. Prentiss Christian School	779	1,975.95	180
49. Kemper Academy	3849	10,654.85	432
50. College Hill Academy	513	1,701.51	199
51. Lawrence County Academy	717	2,149.32	177
52. Leake Academy	2369	6,809.19	500
53. M & L Academy	844	2,013.18	42
54. Greenwood Private Junior High	1160	4,288.95	330
55. Pillow Academy	2453	7,802.87	1189
56. Brookhaven Academy	2675	6,457.74	307
57. Southwest Christian Academy	564	1,689.09	361
58. East Lowndes Academy	1745	5,056.02	247
59. Heritage Academy	1593	4,029.81	350
60. Canton Academy	8437	25,506.60	1225
61. Madison-Ridgeland Academy	448	1,151.01	136
62. Tri-County Academy	1217	4,327.71	438
63. Columbia Academy	1514	4,914.35	379
64. West Marion Academy	2073	6,336.78	383
65. Marshall Academy	1153	3,012.36	600
66. Mt. Pleasant Christian Academy	1254	3,498.30	149
67. North Mississippi Academy	442	1,230.96	95
68. Montgomery-Carroll Academy	699	1,629.49	174
69. Pioneer Academy	438	922.65	45
70. Newton County Academy	887	2,046.92	78
71. Central Academy	1858	5,329.29	751
72. Starkville Academy	3229	9,562.77	553
73. North Delta Schools, Inc.	1021	3,373.19	268

APPENDIX D

PRIVATE NON-SECTARIAN ACADEMIES
PARTICIPATING IN STATE'S TEXTBOOK PROGRAM[1]
1970-71

NAME OF SCHOOL[3]	NUMBER OF BOOKS	COST TO STATE	NUMBER OF STUDENTS[2]
74. West Panola School	1143	$ 3,134.67	203
75. Parklane Academy	1539	3,887.01	228
76. Quitman County Education Foundation	727	3,008.91	480
77. Brandon Academy	3912	11,447.46	589
78. East Rankin Academy	1341	3,149.16	180
79. Flowood Academy	443	1,251.93	227
80. Rankin Academy	1510	5,302.47	284
81. Scott County Christian	2235	6,325.58	320
82. Sharkey-Issaquena Academy	1051	3,815.35	664
83. Simpson Academy	1266	3,427.89	270
84. Pines Academy	156	404.82	44
85. Central Delta Academy	1933	4,878.66	216
86. Indianola Academy	7985	24,029.01	1209
87. North Sunflower Academy	2243	7,841.28	626
88. Paynes Academy	1288	3,635.73	96
89. West Tallahatchie Academy	666	1,856.85	178
90. Hillcrest Academy	547	1,495.26	165
91. Magnolia Heights	1930	5,674.80	228
92. Northwest Academy	1613	4,347.15	239
93. Tunica Institute	2189	6,851.52	495
94. Citizen's School	1776	4,589.91	255
95. Walnut Hills School	317	816.42	114
96. Deer Creek School	1821	5,126.76	496
97. Wayne County School Foundation	814	2,064.21	103
98. Centreville Academy	3750	10,295.55	407
99. Winston Academy	1781	5,036.76	288

PRIVATE NON-SECTARIAN ACADEMIES
PARTICIPATING IN STATE'S TEXTBOOK PROGRAM[1]
1970-71

NAME OF SCHOOL[3]	NUMBER OF BOOKS	COST TO STATE	NUMBER OF STUDENTS[2]
100. Benton Academy	3148	$ 8,432.85	421
101. Bentonia Academy	874	1,951.35	82
102. Manchester Academy	1004	2,356.92	550
103. Highway Baptist School	1304	2,839.83	104
104. Jefferson Davis Academy	1054	3,701.10	356
105. North Central Miss. Schools	723	1,602.87	67
106. Wilkinson County Christian	4002	11,359.74	404
107. Pearl River Academy	660	1,209.06	104
TOTALS:	173,424	$490,239	34,532

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-77

DELORES NORWOOD, ET AL.,
Plaintiffs-Appellants,

vs.

D. L. HARRISON, ET AL.,
Defendants-Appellees.

APPEAL FROM THE NORTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

Appellees move the Court, under Supreme Court Rule 16, to dismiss the appeal in that it does not present a substantial federal question as to the claim that (1) a 1940 law providing loaned textbooks to all individual students in both public and private schools violates equal protection.

Alternatively, appellees move the Court to affirm the final judgment of the District Court on the ground that it is manifest that the questions upon which the decision of the cause depends are so insubstantial as not to need further argument: (1) Because the claim that textbook loans to individual students in both public and private schools is unconstitutional is obviously without merit and

because its unsoundness is unmistakably clear from the previous decisions of this Court.

It is, therefore, respectfully moved that this appeal be dismissed and, in the alternative, that the judgment of the District Court denying all relief be affirmed.

Respectfully moved this 8th day of August, 1972.

A. F. SUMMER
Attorney General of the State of Mississippi

WILLIAM A. ALLAIN
First Assistant Attorney General of Mississippi

HEBER LADNER, JR.
Special Assistant Attorney General of Mississippi

BRIEF IN SUPPORT OF MOTION TO DISMISS

FACTS

A. The Claim.

Delores Norwood and other members of the plaintiffs' class are black public school students of the Tunica County, Mississippi, School District. The defendants, D. L. Harrison, et al., are members of the Mississippi State Textbook Purchasing Board. The plaintiffs, in attendance at the desegregated unitary Tunica County School System, brought suit to enjoin the defendants from providing or permitting the distribution or sale of state owned textbooks to private racially segregated schools and academies. Their standing to sue was alleged to spring from their right to a totally nondiscriminatory school system and their further right to elimination of state support for racially segregated schools, which right had allegedly been frustrated by the creation of a racially segregated Tunica County institute of learning.

The statistical and empirical evidence marshalled by the plaintiffs to show a supposed connection between the growth and health of a private school system in Mississippi and the provision for textbooks cannot obscure the thrust of their complaint. The plaintiffs are enjoying their constitutionally grounded right to a unitary public school system. While the trial produced evidence of a withdrawal from public education in several Mississippi school districts, there was no proof that the statutory promise, existent since 1940, of provision for textbooks wherever a given student attended, was any moving force in the changes which ensued in student population. The three-judge Court found that ninety per cent (90%) of those students previously in public schools remain there.

Section 6656 of the Mississippi Code of 1942, mandates the distribution of free textbooks to Mississippi school children:

> "This act is intended to furnish a plan for the adoption, purchase, distribution, care and use of free textbooks to be loaned to the pupils in all elementary and high schools of Mississippi. The books herein provided by the board shall be distributed and loaned free of cost to the children of the free public schools of the state, and all other schools located in the state which maintain educational standards equivalent to the standards established by the State Department of Education for the state schools."

Children in private schools have access to these books based on only one discretionary factor. The school attended must maintain educational standards equivalent to the standards of the State Department of Education.

The terms of the statute leave no room for interpretation. Since 1940, free textbooks have been provided to the children attending all private schools in each instance where textbook aid has been requested or recommended by representatives of the children or upon recommendation of a third party. Children attending all private and parochial schools located in the State are entitled to free textbooks under the statute if the school they are attending is located in the State and maintains the standards of the State Education Department. It is significant to note that the textbooks are loaned to individual students, even though distribution is handled through the school. The subsidy, if it be a subsidy, is certainly *de minimis*. The annual per pupil expenditure for new or replacement books is a mere six dollars.

Unquestionably, children attending newly formed private schools are enjoying the textbooks. The board, without an alternative, had to provide books to these students. Otherwise, thousands of carefully selected state owned textbooks would have been rendered useless, since they had already been allocated to each child.

ARGUMENT

I.

Aid to Students in Private and Parochial Schools by Lending Them Textbooks Does Not Violate the Fourteenth Amendment.

For the purposes of constitutional adjudication, the contours of forbidden action under the First Amendment's establishment of religion clause, should be analogous to but more stringent than standards applicable to forbidden state action under the Fourteenth Amendment.[1] Just as a state action may not foster an established religion, it may not support racial discrimination. This Court's precedents concerning state provision for assistance to pupils in sectarian schools require affirmance in this case. *Board of Education* v. *Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968); *Everson* v. *Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947); *Abington School District* v. *Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

It is likewise certain from *Lemon* v. *Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) that state aid to religious institutions which offends the First Amendment is direct institutional aid which results in an inter-

1. The rights protected or secured from abridgment under the First Amendment are said to occupy a preferred position. *Follett* v. *Town of McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944).

twined relationship between the government and the religious authority. *Id.* at 757. "Neutral, or nonideological services, facilities or materials" may be provided free of the Establishment clause if they are given in common to all students. In striking down Pennsylvania's aid to defray teachers' salaries in church related schools, the *Kurtzman* Court found that the aid ran afoul of the carefully preserved distinction that aid must flow to the student and not to the church related school per se. *Id.* at 760. Non-student centered financial assistance has likewise been upheld for churches but only in the context where the involvement of the state is not excessive and where there is no continuing call for state surveillance or entanglement. *Walz* v. *Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). While the tax exemption was to benefit the institution directly, it was saved by virtue of its application to all denominations and by the harshness that might be worked by taxing church property.

This Court has unerringly considered whether a given enactment has "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Everson*, supra, at 858. The fact that aid may have assisted a given religious institution did not, in the cited cases, deflect this Court from considering the recipient of the aid and not the institutional by-product of that assistance. Specifically, the *Allen* Court reaffirmed *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913 (1930), holding that state wide provision for free textbooks to all students was permissible under the Fourteenth Amendment in that the state may further secular education through private schools as a proper public concern.

This Court treated the argument that free school books assist students in attending sectarian and parochial schools

as of no consequence. Even though the textbook aid was certainly of some value to the religious school, this Court acknowledged that line drawing was necessary, and that the aid was not so direct or substantial as to violate the Establishment clause. *Allen,* supra, at 1065. This line drawing function is more sharply delineated in the Fourteenth Amendment cases in which the Court's formulation has been that the state must "insinuate itself into a position of interdependence [with otherwise private persons] . . . so that they must be recognized as a joint participant in the challenged activity." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Surely six dollars ($6.00) per year per pupil expenditure, when all students of every race enjoy that benefit, cannot be said to be unconstitutional state aid. Furthermore, the notion that Section 6656 aids schools is at variance with the facts. No funds are provided to the school because the textbooks are loaned to the students, and ownership of the books remains in the state. These were significant facts in *Allen,* and they are significant facts here.

The Court has lately addressed itself to the degree of state action necessary to bring the Fourteenth Amendment into play. *Irvis* v. *Moose Lodge #107,* 40 L.W. 4715 [No. 70-75, June 12, 1972]. There our position was reaffirmed in the assertion that private discrimination does not offend equal protection merely because "the private entity receives any sort of benefit from the State . . ." *Id.* at 4718. To violate equal protection the state must be commanding a discriminatory result by its machinery. *Shelley* v. *Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *Peterson* v. *City of Greenville,* 395 U.S. 298, 83 S.Ct. 1119, 10 L.Ed.2d 323 (1963). Here, the Mississippi statute providing textbooks is in no such "symbiotic" re-

lationship with private discrimination. *Irvis*, supra, at 4718.

One final factor cuts in favor of affirmance. Should the case be reversed, the District Court must decide which of 107 private schools can receive books. Stated "open door" policies must be looked into. Determinations must be reached as to the quantity of integration necessary to avoid the textbook ban. Further, what standard should be used for the state's Catholic schools which have scant numbers of black students?

II.

The Mississippi Statute Does Not Foster Segregated Schools in Purpose or Effect.

Judge John Minor Wisdom, writing for a three-Judge Court which enjoined Louisiana's tuition grant system, distinguished this case:

> "Any aid to segregated schools that is the product of the State's affirmative, purposeful policy of fostering segregated schools and has the effect of encouraging discrimination is significant state involvement in private discrimination. (We distinguish, therefore, state aid from tax benefits, free schoolbooks, and other products of the State's traditional policy of benevolence toward charitable and educational institutions.)" *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833.

This *ipse dixit* from Judge Wisdom seems particularly appropriate since his rationale would void "any state aid" if the purpose and effect were suspect.

The proscription on state aid fostering private discrimination has fallen upon

"aid which is the product of the state's affirmative, purposeful policy of fostering segregated schools and has the effect of encouraging discrimination . . ." *Coffey* v. *Educational Finance Commission*, 275 F. Supp. 854 (S.D. Miss.).

The state must significantly encourage private discrimination both in purpose and effect. *Reitman* v. *Mulkey*, 387 U.S. 369, 87 S.Ct, 1627, 18 L.Ed.2d 830 (1967). The purpose is to be judged by the natural and probable effect of the legislation. *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (S.D. La., 1967), affirmed, 389 U.S. 571 (1968).

Neither in purpose nor effect does the Mississippi Textbook law foster segregated schools. Unlike the tuition grants, it is a "neutral statute" without racial motivation. On the other hand, all the tuition grants were thinly veiled segregation statutes. Tuition grants were direct aid. As stated in *Poindexter*, "The private schools established in Louisiana are direct beneficiaries of the grants in aid; the children or the parents are conduits to the school." *Poindexter*, supra, at 852. Here textbook aid goes directly to the student.

The relationship between the growth of private schools in step with the increased revenue from tuition grants is well documented. Here, no such link is established and cannot be in the face of the unchallenged finding that 90% of the students remain in public schools.

CONCLUSION

State statute's provision for loans of textbooks to all students in both public and private schools does not offend the Equal Protection Clause of the Fourteenth Amendment. Neither does the Mississippi statute foster segregated schools in a way which would invalidate the statute.

Appellees submit that the appeal from the judgment of the District Court denying all relief should be dismissed, or, in the alternative, that the Judgment and Opinion upon which it is based should be affirmed without further briefing and argument.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-77

DELORES NORWOOD, ET AL.,
Appellants,

vs.

D. L. HARRISON, SR., ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

BRIEF OF APPELLEES

QUESTION PRESENTED

Whether §6656, Miss. Code 1942, providing loans of state owned textbooks to all educable children violates the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

Delores Norwood and other members of the appellant's class are black public school students of the Tunica County, Mississippi School District. The appellees, D. L. Harrison, et al., are members of the Mississippi State Textbook Purchasing Board. The appellants, in attendance at

the desegregated unitary Tunica County School System, brought suit to enjoin the defendants from providing or permitting the distribution or sale of state owned textbooks to private racially segregated schools and academies.

The impression created by appellant's Statement of Facts as it involves Tunica and Holmes Counties, as well as cities like Canton, Jackson, and Indianola, is that there was a *sub rosa* transmutation of public to private schools. The use of target districts is not representative of the pace or scope of the development of private schools in Mississippi. Certainly, these extreme examples are not consistent with the lower court's finding that 90% of the educable children remain in public schools.

Two other points need to be made concerning the nature of the private schools in Mississippi. All of the depositions of superintendents of the private schools disclose an "open enrollment" policy, the main criterion being ability to pay. Thus, the characterization of the schools as "private segregationist academies" [Brief of Appellants, p. 11] is not ideologically correct. The superintendents uniformly testified that their schools were formed to provide quality education. The textbook law, in their view, had nothing to do with the formation or continuation of these schools.

Second, the factual findings from *Coffey* v. *State Educational Finance Commission*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969) that the new schools were opened on the "thinnest financial basis" are stale findings of little use in resolving this present controversy. Many of the academies operate in new facilities; virtually none use former public school properties. Many of the schools were started after *Coffey* and its findings have little relevance to them.

SUMMARY OF ARGUMENT

State-furnished textbooks to all educable children in Mississippi serve a racially neutral and benevolent purpose. The degree of aid, if any, which textbook program renders private education is insignificant. Books are loaned to students at a per capita annual expense of $6.00.

The First Amendment's prohibition of "Establishment" and the Fourteenth Amendment's similar ban on discrimination are analogous limitations. State aid to pupils in sectarian schools is constitutional where that aid is to the student and not to the school per se. By the same token, the State may grant benefits without regard to race by means of free textbooks without offense to the Fourteenth Amendment.

The Court below found that the provision for textbooks was not vital to the private schools and that public integrated education was secure. These findings are not clearly erroneous however the test is framed. For the existence of a constitutional violation, there must be a partnership between private discrimination and State action that is "symbiotic." Here, private discrimination rests on private choice and not any perceptible moving hand of the State.

ARGUMENT

TEXTBOOK AID TO INDIVIDUAL STUDENTS IS NOT SIGNIFICANT INVOLVEMENT WITH THE BELIEFS OR PRACTICES OF PRIVATE SCHOOLS

For the purpose of constitutional adjudication, the contours of forbidden action under the First Amendment's establishment of religion clause should be analogous to but more stringent than standards applicable to forbidden state action under the Fourteenth Amendment. Just as a state may not foster an established religion, it may not support racial discrimination. This Court's precedents concerning state provision for assistance to pupils in sectarian schools require affirmance in this case. *Board of Education* v. *Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968); *Everson* v. *Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947); *Abingdon School District* v. *Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

Just as there is a line between state neutrality to religion and state support of it, there is a line drawing function in the Fourteenth Amendment cases between neutrality toward and support of discrimination. Whether government support is "institutional" aid which violates the Establishment Clause is certainly not a sufficient Fourteenth Amendment test for state action. However, identifying "institutional" support for religion or segregation certainly would point the Court toward further inquiry into the state's involvement with private discrimination.

The rights protected or secured from abridgment under the First Amendment are said to occupy a preferred position. *Follett* v. *Town of McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944).

The appellant's distinctions of equal protection and Establishment Clause standards prove too much. Appellant perceives (Brief of Appellants, p. 32) that a construction grant to a religious hospital is not unconstitutional, where discrimination by such a hospital would be unconstitutional. Considered as a hypothetical, appellant's conclusion might not follow if a pure construction grant were involved with no other strings.

If the hypothetical is correct, we stress that "institutional" aid is the quality that lends truth to it, not a greater constitutional mission to stamp out discrimination. Further, it is not so much the presence of state or federal money but the ambience of public control and supervision that follows it. *Tilton* v. *Richardson,* 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971), the construction grant example, concerned a straight grant under the Higher Education Facilities Act of 1963, 20 U.S.C. 711, 721, while *Simkins* v. *Moses H. Cone Hospital,* 4 Cir., 1963, 323 F.2d 959, cert. denied, 376 U.S. 938 (1963), involved Hill-Burton funds. It was not the grant per se that caused the court to find state action in *Simkins,* but rather, the elaborate analysis of state regulation inherent in the program, exercise of a state function through the allocation of medical care, and the presence of public trustees on the boards of the hospitals.

Appellants also stress (Brief of Appellants, p. 33) that religious and secular aims of both the aid and recipient institution may be clearly delineated in First Amendment cases. They say education and segregation, on the other hand, are inextricably interwoven. This analysis assumes a compactness and neatness in the religious-secular purpose distinction that does not exist. All state aid which fuels the secular purpose of an institution has some incremental effect on the institution's ability to further re-

ARGUMENT

TEXTBOOK AID TO INDIVIDUAL STUDENTS IS NOT SIGNIFICANT INVOLVEMENT WITH THE BELIEFS OR PRACTICES OF PRIVATE SCHOOLS

For the purpose of constitutional adjudication, the contours of forbidden action under the First Amendment's establishment of religion clause should be analogous to but more stringent than standards applicable to forbidden state action under the Fourteenth Amendment. Just as a state may not foster an established religion, it may not support racial discrimination. This Court's precedents concerning state provision for assistance to pupils in sectarian schools require affirmance in this case. *Board of Education* v. *Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968); *Everson* v. *Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947); *Abingdon School District* v. *Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

Just as there is a line between state neutrality to religion and state support of it, there is a line drawing function in the Fourteenth Amendment cases between neutrality toward and support of discrimination. Whether government support is "institutional" aid which violates the Establishment Clause is certainly not a sufficient Fourteenth Amendment test for state action. However, identifying "institutional" support for religion or segregation certainly would point the Court toward further inquiry into the state's involvement with private discrimination.

The rights protected or secured from abridgment under the First Amendment are said to occupy a preferred position. *Follett* v. *Town of McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944).

The appellant's distinctions of equal protection and Establishment Clause standards prove too much. Appellant perceives (Brief of Appellants, p. 32) that a construction grant to a religious hospital is not unconstitutional, where discrimination by such a hospital would be unconstitutional. Considered as a hypothetical, appellant's conclusion might not follow if a pure construction grant were involved with no other strings.

If the hypothetical is correct, we stress that "institutional" aid is the quality that lends truth to it, not a greater constitutional mission to stamp out discrimination. Further, it is not so much the presence of state or federal money but the ambience of public control and supervision that follows it. *Tilton* v. *Richardson,* 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971), the construction grant example, concerned a straight grant under the Higher Education Facilities Act of 1963, 20 U.S.C. 711, 721, while *Simkins* v. *Moses H. Cone Hospital,* 4 Cir., 1963, 323 F.2d 959, cert. denied, 376 U.S. 938 (1963), involved Hill-Burton funds. It was not the grant per se that caused the court to find state action in *Simkins,* but rather, the elaborate analysis of state regulation inherent in the program, exercise of a state function through the allocation of medical care, and the presence of public trustees on the boards of the hospitals.

Appellants also stress (Brief of Appellants, p. 33) that religious and secular aims of both the aid and recipient institution may be clearly delineated in First Amendment cases. They say education and segregation, on the other hand, are inextricably interwoven. This analysis assumes a compactness and neatness in the religious-secular purpose distinction that does not exist. All state aid which fuels the secular purpose of an institution has some incremental effect on the institution's ability to further re-

ligious doctrine. There is simply no more furtherance of segregation with textbook aid than there is of a given religious doctrine in a parochial school receiving similar aid.

The state believes that this case is squarely governed by *Board of Education* v. *Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968). There, a New York statute requiring school districts to purchase and lend textbooks to students enrolled in parochial as well as in public and private schools was under attack. This Court held the law was not in conflict with the First or Fourteenth Amendments to the Constitution of the United States. As the Court stated:

> The express purpose of §701 was stated by the New York legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the state. Thus no funds or books are furnished to parochial schools and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution. *Id.* at 1065, 66.

It is likewise certain from *Lemon* v. *Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), that state aid to religious institutions which offends the

First Amendment is direct institutional aid which results in an intertwined relationship between the government and the religious authority. *Id.* at 757, "Neutral or nonideological services, facilities or materials" may be provided free of the Establishment Clause if they are given in common to all students. In striking down Pennsylvania's aid to defray teachers' salaries in church-related schools, the *Kurtzman* Court found that the aid ran afoul of the carefully preserved distinction that aid must flow to the student and not to the church-related school per se. *Id.* at 760. Nonstudent centered financial assistance has likewise been upheld for churches but only in the context where the involvement of the state is not excessive and where there is no continuing call for state surveillance or entanglement. *Walz* v. *Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). While the tax exemption was to benefit the institution directly, it was saved by virtue of its application to all denominations and by the harshness that might be worked by taxing church property.

This Court has unerringly considered whether a given enactment has a "secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Everson, supra*, at 838. The fact that aid may have assisted a given religious institution did not, in the cited cases, deflect this Court from considering the recipient of the aid and not the institutional by-product of that assistance. Specifically, the *Allen* Court reaffirmed *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913 (1930), holding that statewide provision for free textbooks to all students was permissible under the Fourteenth Amendment in that the state may further secular education through private schools as a proper public concern.

The theory that §6656 is a measure benefiting children rather than schools has strong basis in fact. The measure was originally sustained as one to encourage "the promotion of intellectual and moral improvement" of the citizens of the state. *Chance* v. *Mississippi State Textbook Rating and Purchasing Board*, 190 Miss. 453, 200 So. 706 (1941). Neutrality in matters of private benefit was clear enough:

> It [the state] cannot control what one child may think, but it can and must do all it can to teach the child how to think. The state . . . should not . . . proscribe him from benefits common to all." *Id.* at 710.

The accent of private benefit is consistently carried out by §6656 which provides for loans of the textbooks which the students are free to carry to their homes. In the absence of these benefits it is doubtful that the cost of books would be borne by the schools in the absence of this statute. *Note*, 43 Miss. L.J. 737 (1972).

Under this "child benefit theory" the state may extend certain welfare aid to students attending church related schools in situations where general aid to the parochial schools themselves would be unconstitutional, 13 *J. Pub. L.* 76, 79 (1964). The theory pales, however, before a finding that such aid accrues to the benefit of the schools themselves. Annot. 93 A.L.R.2d 986, 987 (1964); *Smith* v. *Donahue*, 202 App. Div. 656, 195 N.Y.S. 715 (1922); *Haas* v. *Independent School Dist.*, 69 S.D. 303, 9 N.W.2d 707 (1943). The doubt surrounding the validity of the theory was dispelled in *Board of Education* v. *Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968). The court revivified the child benefit theory by characterizing the legislation as benefiting the parent and child.

LOANED TEXTBOOKS TO ALL EDUCABLE CHILDREN IS NOT SIGNIFICANT STATE AID TO RACIAL DISCRIMINATION

This case once again calls for a formulation of the character and degree of state aid which must exist to render private action subject to the Fourteenth Amendment. Various formulations in which private-choice-state aid equation have been framed—"significant aid," "symbiotic relationship" tend to obscure inquiry into the cause-effect relationship between the state action and private action. One may find private discrimination, look for some ingredient of state action and subjectively label the result encouragement. Or, one may identify the state action, look for its actual impact on private discrimination, and determine whether it is state action or private ordering that is actually producing the result.

This case also involves an accommodation between the place public education must enjoy—as an outgrowth of the "affirmative duty" rationale—and the doctrine of private choice embodied in *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Thus, the question is broader than the constitutionality of §6656. It is whether the State may function neutrally, treating both races alike, or whether it must adopt sanctions against private education in the realm of State provided services not significant enough to motivate private discrimination. What we mean here is that State services such as police and fire protection, public health protection, driver training, and practice teachers trained in public universities may in the aggregate be a greater financial aid to private schools than books, but they would certainly not be pivotal in imposing a choice to discriminate.

This court originally broached the issue of impermissible state aid to education in *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 [D.C.E.D. La. 1961], affd. 368 U.S. 515 (1962). There at issue was a tuition grant scheme with a transparent design of recasting public schools into "private" ones. There was no colorable constitutional justification in *Hall* for the closing of the schools or the mystical substitution of "private" for "public" character in the funding arrangement. Both *Hall* and *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964) invalidated a total partnership between State action and private segregation, the one unavoidably leading to the other.

The tuition grant cases, *Coffey* v. *State Educational Finance Commission*, 296 F. Supp. 1389 (S.D. Miss. 1969); *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967), affd. 389 U.S. 571 (1968); *Griffin* v. *State Board of Education*, 296 F. Supp. 1178 (E.D. Va. 1969), all have in common the active fostering of alternatives to public education. Direct institutional aid variously adjudged to be "critical", "substantial", or "pivotal" to the new schools was, on the evidence, found to be underpinning an ever-growing network of private schools. Since these nominally private institutions were financed almost entirely from the public treasury the natural and reasonable effect of the tuition legislation was to underwrite and encourage private discrimination.

Illustrative of the approach to tuition grants is that of the Fifth Circuit. Treating Louisiana tuition grant statute Judge Wisdom articulated a two-pronged test:

> "Any aid to public schools that is the product of the State's affirmative, purposeful policy of fostering segregated schools and has the effect of encouraging discrimination is significant state involvement in private

> discrimination (we distinguish therefore, state aid from tax benefits, free school books, and other products of the State's traditional policy of benevolence toward charitable and educational institutions), *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833."

Both Judge Wisdom's test and his disclaimer for school books are significant in that his rationale would void "any state aid" if the purpose and effect were suspect.

The three-judge court below applied these tests and sustained the act, *Norwood* v. *Harrison*, 340 F. Supp. 1003 (S.D. Miss. 1972). It wrote that "the free textbook program began without racial motivation. . ." and had been uniformly applied, *Id.* at 1013. It found that there had been no real encouragement of discrimination in that 90% of the state's educable children remained in public schools. Finally, it discounted any notion that deprivation of the books would "roll-back" private school enrollment, *Id.* at 1013. On the issue of encouragement the court wrote:

> Plaintiffs say that furnishing the free textbooks to pupils in private schools encourages attendance at such schools. This, of course, is conjectural, as there is no substantial proof on that score. It occurs to us, however, that if encouragement alone is a sufficient test and if impermissible encouragement necessarily follows from the issuance of the books and subsequent attendance at a particular school, then the books may not be issued to those attending private sectarian schools (something which the Supreme Court has thus far declined to invalidate) *Id.* at 1013.

Appellees stress both that "encouragement" of discrimination was not found here and in fact may no longer be constitutionally sufficient. The court seems in *Moose*

Lodge No. 107 v. *Irvis*, ... U.S. ....., 92 S.Ct. ....., 32 L.Ed.2d 627 (1972) to have moved back to the affirmative enforcement of discrimination rationale of *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) rather than the subjective notion of "encouragement" of discrimination found in *Reitman* v. *Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967). Indeed *Moose Lodge* avoids citing *Reitman* for any "encouragement" theory, preferring to stress the "symbolic" or alter ego relationship between state action and private conduct as announced in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). The relationship necessary between states and private entities to invoke the Fourteenth Amendment is one in which the State has "insinuated itself into a position of interdependence [with otherwise 'private persons'] . . . . that they must be recognized as a joint participant in the challenged activity". *Id.* at 52.

Burton's reliance on significant multiple examples of state aid in the construction of the parking facility, on the one hand, and *Moose Lodge's* insistence that there must be some demonstrable way in which state regulation or state benefits fosters racial discrimination, *Id.* at 637, 639, seems to confine the contours of the Fourteenth Amendment to private action only if there is a significant interfacing effect between private acts and state action.

Other cases decided since *Reitman* emphasize that it turned very heavily on state court findings of encouragement of discrimination. *Palmer* v. *Thompson*, 403 U.S. 217, 91 S.Ct. 1960, 29 L.Ed.2d 438 (1971) is one:

> In the first place there are no findings here about any state "encouragement" of discrimination. We need not speculate upon such a possibility for there is no such finding here, and it does not appear from the

record that there was evidence to support such a finding. *Reitman* v. *Mulkey* was based on a theory that the evidence was sufficient to show the State was abetting a refusal to rent apartments on racial grounds. *Id.* at 444.

Similarly, *Reitman* was distinguished in *Evans* v. *Abney*, 396 U.S. 435, 90 S.Ct. 628, 24 L.Ed.2d 634 (1970) where the effect of a state court's termination of a discriminatory trust was in issue. A *Reitman* based argument was offered that Georgia's trust statutes, permissive on racial discrimination, induced the testator to discriminate. It was rejected since there was no evidence of such a motive. Here appellants argue from the parallelism of public to private changeovers in certain target districts. But what of the fact that 8,000 pupils in 41 schools spurn the publicly provided textbooks? Is not the fact that 25% of the private school pupils (consisting of 10% of the total of pupils) opt out of the program sufficient to support the lower court's holding of no encouragement. Certainly the fact is enough to show that textbooks are not the *sine qua non* of private education.

There is also a question of whether a neutral public policy on books works any injury on the plaintiffs. A state's neutrality toward discrimination was even sanctioned in dictum in *Reitman* v. *Mulkey*: "a state is permitted a neutral position with respect to private racial discrimination". *Id.* at 834. A state's abstention from action which would result in private discrimination was also sanctioned in *Shelley* v. *Kraemer*, 334 U.S. 1, 19, 68 S.Ct. 836, 92 L.Ed. 1161, 1183.

Does the affirmative duty doctrine have any bearing on the constitutionality of §6656? Appellants say that the constitutionality of state policy in the context of the dual

system is measured by "whether it hinders or furthers the process of school desegration." *Wright* v. *City of Emporia*, ... U.S. ....., 92 S.Ct. ....., 33 L.Ed.2d 51. Whether the keystone is effective "disestablishment," *Green* v. *County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968) or "unitary", *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, 571 (1971), we cannot assume from the decisions of this court that state action which bears any relationship whatever to the interaction between public and private education must be judged by that standard. Once the duties of *Swann* and *Green* are met in the sense that the public school system is composed of just schools—neither white nor black—the affirmative duties are discharged.[2] All a state must do is maintain a preferred competitive position for public education. It should be required to steer clear of institutional aid, but should not be required to take sanctions against private education. This court should reaffirm that there is still a constitutionally viable choice between public and private education. Only where the state by its hand points toward private discrimination should the Fourteenth Amendment come into play.

Neither can §6656 be said to be a law neutral on its face but having primary impact on the minority. *Anderson* v. *Martin*, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964). In the context where all sorts of schools receive equal treatment, no right of the plaintiffs is being frustrated.

---

2. The affirmative duty extends to establishing a unitary system of public education, *Green* v. *County School Board*, *supra*, *Swann*, *supra*, but apparently does not extend to mandating centralized public education. In short, a state must undo all it has done to further a dual system in facilities, staff, etc., but must not attempt to coerce attendance in public schools. The distinction is not at variance with the school property cases, *Wright* v. *City of Brighton*, 441 F.2d 447, 5 Cir. (1971), et al., since they involve institutional aid which is a special burden on the racial minority. Here the textbook law is neutral in origin and impact.

It is private choice and not school books that is luring students from the public schools. Moreover, the plaintiff's constitutional right is one of attendance at schools, not attendance with pupils.

Assuming a constitutional right to opt out of the system, *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1922), the statutory provision for books at every school, antedating the entire integration controversy, would seem to work no injury on students in one system by those in another. Appellants' theory of "frustration" is simply too broad and too selective to be viable. They exempt from the prohibition private schools antedating the so-called white flight, parochial schools said not to have provided a refuge to white students and certain "other" schools (Brief of Appellants, p. 7). If injury is wrought on the plaintiffs by erosion of white attendance why does not the principle have broader reach?

Considerations of the possible relief in this case make clear the difficulty in ruling for the appellants. Determinations would have to be made as to the quantity of integration necessary for a private school to avoid a ban on textbooks. Since attendance is totally voluntary in these schools, exclusion of black pupils cannot be assumed from attendance in numbers that would be clearly insufficient in a public school. Moreover, stated "open door" policies would have to be looked into. Even though Catholic schools are exempted from the requested relief, there is a grave question whether their black enrollment would be sufficient to come out from under the requested ban. Finally, should not each school have its day in court on its enrollment policies? These obstacles to consistent and efficacious relief strongly counsel in favor of affirming the judgment of the District Court.

CONCLUSION

State furnished textbooks avoid the Fourteenth Amendment's proscriptions because they (1) are provided to children of all races, (2) serve a benevolent purpose and (3) provide a benefit to the child and not his chosen institution.

By analogy to the First Amendment Establishment Clause cases, textbook aid serves a secular function which the state may further. Based on the findings of fact that the aid does not encourage discrimination or significantly abet a private choice to discriminate, there is no Fourteenth Amendment violation. The holding of *Cochran* v. *Louisiana State Board of Education* that textbook aid is a proper public concern remains good law.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-77

DELORES NORWOOD, *et al.*,

Appellants,

v.

D. L. HARRISON, SR., *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

APPELLANTS' BRIEF

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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APPELLANTS' BRIEF

OPINION BELOW

The opinion of the United States District Court for the Northern District of Mississippi is reported at 340 F. Supp. 1003 (N.D. Miss. 1972).

JURISDICTION

This is an appeal from a final judgment entered by a three-judge district court, convened pursuant to 28 U.S.C. §§ 2281 and 2284, denying a permanent injunction enjoining state officials from enforcing a state

statute having state-wide application. Jurisdiction accordingly vests in this Court under 28 U.S.C. § 1253.

Final judgment was entered on April 18, 1972. Notice of Appeal was filed in the district court on May 16, 1972—within 60 days from the final judgment (28 U.S.C. § 2101(b)).[1] A jurisdictional statement was filed and the case docketed in this Court on July 14, 1972—within 60 days from the filing of the notice of appeal (U. S. Supreme Court Rule 13). October 10, 1972, this Court noted probable jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

This case also involves § 6656 of the Mississippi Code, 1942 (volume 5, pp. 495-96 of the Mississippi Code, 1942, Chap. 152, Laws of 1940), which states:

> Plan.—This act is intended to furnish a plan for the adoption, purchase, distribution, care and use of free textbooks to be loaned to the pupils in all elementary and high schools of Mississippi.
>
> The books herein provided by the board shall be distributed and loaned free of cost to the children of the free public schools of the state, *and all other schools located in the state*, which maintain educational standards equivalent to the standards established by the state department of education for the state schools.

---

[1] In accordance with standard practice in three-judge district court cases plaintiffs also perfected an appeal to the United States Court of Appeals for the Fifth Circuit.

Teachers shall permit all pupils in all grades of any public school to carry to their homes, for home study, the free text books loaned to them, and to carry to their homes, for home study, all other regular text books used in the public schools of the state whether they be free text books or not. (Emphasis added.)

QUESTION PRESENTED

Whether Miss. Code, 1942, § 6656 to the extent that it provides for the distribution of state owned textbooks to private racially segregated academies formed for the purpose and/or having the effect of providing white students and faculty with an alternative to public integrated schools, violates the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

I.

PROCEEDINGS BELOW

January 23, 1970, the United States District Court for the Northern District of Mississippi entered an order requiring the integration of all public schools of Tunica County, Mississippi, no later than February 2, 1970, in accordance with standards established by this Court in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), and *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969).[2] Upon the entry of this order the parents of *all* white students of Tunica

[2]The history of public school desegregation in Tunica County is reviewed in *United States v. Tunica County School District*, 323 F. Supp. 1019, 1021-23 (N.D. Miss. 1970).

County withdrew their children from public schools and formed a private academy housed in church facilities. (Petty Deposition, p. 8.) The principal and 17 high school teachers of the Tunica County system resigned in mid-year to assume positions with the new private school. (Isbell Deposition, pp. 16, 28.)

December 4, 1969, the Executive Secretary of the Mississippi Textbook Purchasing Board, appellee herein, had circulated a memorandum to "County and Separate District Superintendents" which stated:

> Subject: Textbooks for Private Schools.
>
> We have many disturbed parents since the Court decisions. Many of them are going to organize private schools, and they are going to need books.
>
> Since all the money has been allotted for this year, it will be necessary for the superintendents to transfer books with the student as he transfers to the private school. . . .
>
> We appreciate your cooperation in this difficult situation. (Snowden Deposition, June 28, 1971, Exhibit1)

As a result of this memorandum the textbooks used by white students fleeing integrated education in Tunica County and throughout the state were transferred from public schools to private segregationist academies in January, 1970. (Floyd Deposition, pp. 16-17, 33)[3]

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[3]The first challenge to the transfer of state textbooks from public to private schools of Tunica County was entered in *United States v. Tunica County Board of Education*, 323 F. Supp. 1019 (N.D. Miss. 1970). There, black public school children challenged the transfer of state textbooks from Tunica public schools to the Tunica Church School which discontinued its program and returned all textbooks to the public schools at the conclusion of the 1969-70 school year. The issue was, in the context of that litigation, moot. 323 F. Supp. at 1028.

(footnote continued)

October 8, 1970, four black students of Tunica County filed this class action to enjoin the Mississippi Textbook Purchasing Board and its Executive Secretary from distributing state-owned textbooks to the Tunica Institute of Learning[4] and all other academies of Mississippi formed in response to the implementation of this Court's *Brown*, *Alexander* and *Green* decisions.[5] Plaintiffs alleged, *inter alia*, that:

> [T]heir right to a racially integrated and otherwise non-discriminatory public school system, vindicated by order of . . . [the district court] dated January 23, 1970 [*United States and Driver v. Tunica County School District*, . . .] and their right to the elimination of state support for racially segregated schools, have been frustrated and/or abridged by the creation of the racially segregated Tunica County Institute of Learning and the policies and practices of defendants as set forth below. . .

(footnote 3 continued)

The instant lawsuit, however, named the Tunica Institute of Learning as the private academy of Tunica County enrolling all white students of the district and receiving state owned textbooks. During the 1970-71 school year that academy held in excess of 2,000 volumes costing the State $7,000. (See Appendix A. hereto, p. 2a).

[4]Tunica County public school officials continued to pay the salaries of the white teachers and the principal who abandoned the public schools in favor of the newly formed church academy. This practice was enjoined and restitution ordered. *United States v. Tunica County School District*, 323 F. Supp. 1019 (N.D. Miss. 1970), affirmed, 440 F.2d 377 (5th Cir. 1971).

[5]*Brown v. Board of Education*, 347 U.S. 483 (1954). (*Brown I*); *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

Beginning with the 1964-65 school year—when the first school districts in Mississippi were required to integrate under freedom of choice—and through the present, numerous private schools and academies have been either formed or enlarged, which schools have established as their objective and/or have had the effect of affording the white children of the state of Mississippi racially segregated elementary and secondary schools as an alternative to racially integrated and otherwise non-discriminatory public schools.

The defendants have provided these racially segregated schools and academies and the students attending such schools, . . . textbooks purchased and owned by the State of Mississippi and have thereby provided state aid and encouragement to racially segregated education and have thereby impeded the establishment of racially integrated public schools in violation of plaintiffs' rights assured and protected by the Fourteenth Amendment to the Constitution of the United States.

(A. 20-21)

Appellants prayed for an order enjoining the Mississippi Textbook Purchasing Board from any further distribution of state owned textbooks to segregationist academies and for an order recalling state textbooks which had already been distributed to such institutions. (A. 21-22) After stipulations were filed and depositions taken, appellants refined their prayer for relief: we sought an order withdrawing state textbook aid from 148 specifically named all-white private academies, enrolling 42,000 students, formed or enlarged for the purpose and/or with the effect of providing white students with an alternative

to public integrated education. *Norwood v. Harrison*, 340 F. Supp. at 1011.[6]

[6]There were 202 private schools operating in Mississippi during the 1970-71 school year:

	Number of Schools	Enrollment
Private segregationist Academies receiving State textbooks	107	34,000 (all white)
Private segregationist Academies eligible but not participating in State's program	41	8,000 (all white)
Sub-Totals	148	42,000
Catholic Schools	47	12,100 (9,200 white 2,900 black)
Other	7	1,800 (1,000 white 800 black)
Sub-Totals	54	13,900 (10,200 white 3,700 black)
Total for all private schools:	202	65,900

(*Norwood v. Harrison, supra*, 340 F. Supp. at 1011, A. 40-43)

Appellants did not challenge textbook aid to the Catholic School System of the State because that system has generally not been made available to white students fleeing integrated public schools. In addition, we excluded the 7 academies, referred to above as "Other," because they were either all-black, integrated or serving the needs of abandoned, orphaned or retarded children.

> Beginning with the 1964-65 school year—when the first school districts in Mississippi were required to integrate under freedom of choice—and through the present, numerous private schools and academies have been either formed or enlarged, which schools have established as their objective and/or have had the effect of affording the white children of the state of Mississippi racially segregated elementary and secondary schools as an alternative to racially integrated and otherwise non-discriminatory public schools.
>
> The defendants have provided these racially segregated schools and academies and the students attending such schools, . . . textbooks purchased and owned by the State of Mississippi and have thereby provided state aid and encouragement to racially segregated education and have thereby impeded the establishment of racially integrated public schools in violation of plaintiffs' rights assured and protected by the Fourteenth Amendment to the Constitution of the United States.
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April 17, 1972, the district court rendered its opinion holding that: (a) plaintiffs had failed to demonstrate that textbook aid was vital to the private schools, i.e., that whites would return to public schools if only textbook aid was withdrawn; moreover, public integrated education was secure since 90% of the student population of the state continued to enroll in public schools; (b) the statute under challenge was enacted in 1940 and was hence free of any specific intent to aid private racially segregated academies; (c) the statute under challenge provides textbook aid to students and not to schools; and the state's duty to educate all of its youth permitted the distribution of textbooks to students attending segregationist academies for the very reasons expressed by this Court in upholding similar aid to parochial schools against a First Amendment challenge, *Board of Education v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Education*, 330 U.S. 1 (1947).

II.

THE GROWTH OF PRIVATE ACADEMIES AND THEIR IMPACT ON PUBLIC EDUCATION

A. Statewide Perspective.

The district court found that by the commencement of the 1970-71 school year a network of 148 private segregated academies enrolling approximately 42,000 students had been formed in the state to provide white students with an alternative to integrated public schools. *Norwood v. Harrison, supra*, 340 F. Supp. at 1011, and footnote 5 therein. As we demonstrate below the creation and enlargement of these academies occurred simultaneously with major events in the desegregation of public

schools and frustrated the attainment of fully integrated public schools and the promise of *Brown, Green* and *Alexander*.

The decade immediately following *Brown*—1954-1964—was marked by "Massive Resistance" and public schools were operated on an absolutely segregated basis. Accordingly, as late as the 1963-64 school year there was virtually no private segregationist school system in the State.[7]

In 1963, black students in Jackson, Leake County, Biloxi and Clarksdale filed the state's first school desegregation suits.[8] In 1964, these four districts were required to admit black first graders into white schools and the private segregationist academy appeared for the first time. White Citizens' Council School #1 and Southside Academy opened their doors in Jackson. Clarksdale Baptist School began an elementary program for the first time; and St. George Day School, also of Clarksdale, doubled its enrollment and added three grades to its curriculum. The Leake County Academy opened

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[7]During the 1963-64 school year there were 17 private non-Catholic academies enrolling 2,362 students operating in the state. Five enrolled black students only; two were schools for retarded, orphaned or abandoned children; one was a military academy; two were parochial schools now operated on an integrated basis; two operated part-time programs enrolling only 25 students. The five remaining schools enrolled only 722 students. (A. 40-41)

[8]*Evers v. Jackson Municipal Separate School District; Hudson v. Leake County School Board; Mason v. Biloxi Municipal Separate School District*, 328 F.2d 408 (5th Cir. 1964). The early history of school desegregation in Clarksdale is reviewed in *Henry v. Clarksdale Municipal Separate School District*, 409 F.2d 682, 684 (5th Cir. 1969).

with a curriculum limited to first graders.[9] These five schools were the only new or enlarged private academies operating in the state during the 1964-65 school year.[10]

1965-66 witnessed the implementation of the Civil Rights Act of 1964 and the beginning of a concert of effort involving the Department of Justice, Department of Health, Education and Welfare and private litigants to promote integrated public schools. Prodded by *Singleton v. Jackson Municipal Separate School District*, 348 F.2d 729 (5th Cir. 1965), most public school districts in the state integrated at least four grades under freedom of choice during the 1965-66 school year. (Henderson Deposition, Exhibit 9.) And by 1965-66, Mississippi counted 41 private segregationist academies enrolling 3,841 white students.

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[9]The Leake County Academy closed after one year of operation. It then reopened in January, 1970 upon this Court's order in *Alexander*. All of the Academy's 333 students and 13 of its 15 teachers had enrolled or taught in the public schools during the first semester of the 1969-70 school year. The school is housed in an abandoned public school building (Sheppard Deposition, pp. 5, 9-13).

One witness said that the Leake County Academy might have opened during the 1963-64 school year, one year before the public first grade was desegregated under freedom of choice. (Sheppard Deposition, pp. 4-5.) However, the school desegregation suit was by then notorious. See footnote 8, above.

[10]The facts recorded in this paragraph are contained in the following parts of the record: Supplement to Record entered in the district court on August 10, 1971, Chart, *Interdependence of Public School Desegregation and the Formation and Growth of Private Academies;* Wright Deposition, Exhibit One, thereto; Bounds Deposition, Exhibit 10, thereto; Sheppard Deposition, pp. 4-10; Oral Argument Exhibit Two, entered into record by order of the district court, May 15, 1972.

> [D]uring the 1965-66 school year twenty new private schools . . . were added [to the twenty-one] that had been in operation in 1964-65. In each instance the new schools opened in public school districts which either were under court order to desegregate or had submitted voluntary desegregation plans to the United Stated Department of Health, Education and Welfare. *Coffey v. State Educational Finance Commission*, 296 F. Supp. 1389, 1391 (S.D. Miss. 1969).

Green and *Alexander*, implemented in Mississippi during the 1969-70 or 1970-71 school year, signalled the end of freedom of choice and token desegregation; all students in Mississippi public schools were then assigned under "terminal" plans for desegregation. 1969-70 also witnessed the opening of 55 new private academies and the withdrawal of 21,875 white students from public schools. During the 1970-71 school year an additional 11,061 white students withdrew from public schools to enroll in 31 new academies. (Appendix B hereto; A. 42)[11]

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[11] "Voluntary" desegregation, pursuant to directives of the Department of HEW issued under Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d-1), proceeded at approximately the same pace as desegregation mandated by court order. According to Dr. Lloyd Henderson, Director, Education Division, Office for Civil Rights, the first set of regulations promulgated upon the passage of the Civil Rights Act of 1964 were distributed to all school districts in the Nation during the 1964-65 school year. The first guidelines, requiring the desegregation of several grades under freedom of choice, were entered in April, 1965. In March, 1968, immediately prior to this Court's *Green, supra*, decision, HEW promulgated guidelines requiring the formulation of plans which achieved desegregation; freedom of choice was thereafter unacceptable (Henderson Deposition, pp. 9-10, 20-22, Exhibit 9 thereto).

In summary, there were two major thrusts in the history of public school desegregation in the state of Mississippi. The first occurred in 1965 when freedom of choice plans for four grades were implemented in most school districts. The second occurred in September and December, 1969, or by September, 1970, upon the implementation of *Green* and *Alexander*. And the record shows that virtually all of the 148 segregationist academies of the State opened or substantially expanded their enrollment or curriculum concurrently with these two major events in public school desegregation.[12] (A. 42; Appendix B, hereto.)

In almost all cases the private segregationist academies were opened without any meaningful planning and on the "thinnest financial basis." *Coffey v. State Educational Finance Commission*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969). No less than 19 were opened in obsolete and abandoned public school buildings; an additional 26 were opened in church facilities intended for Sunday School purposes only; seven academies were opened in private homes or in buildings that were not constructed to house educational facilities. Of the approximately 100 academies for which information is available through deposition, only four opened in newly constructed facilities designed to house an educational program. (A. 44-49) Many of the schools operated without any formal

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[12]The Jackson Municipal Separate School District was the only public school district in the state required to enter substantial changes in its plan of pupil assignment upon this Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

budget and a few depended upon contributions rather than tuition.[13]

Virtually all of the academies obtained the majority of their teachers and administrators from the public school systems. Virtually all rely upon opposition to desegregation of public schools and "white flight" for their survival.

B. Impact of Private Academies on Public School Desegregation in Specific School Districts.

Although the district court found that 90% of the state's school population continues to attend public schools it carefully refrained from any specific finding that private academies have not undermined public integrated education. In fact, the state-wide retention statistic of 90% depends upon the inclusion of many school districts which have only a token number of black students. In the entire "gulf coast" of Mississippi and several of the northernmost school districts of the state, for example, there has been less resistance to public school desegregation.[14] But in districts where public

[13]See, for example, Minor Depositon, p. 16; Wilson Deposition, pp. 10, 13. There were a few private schools which were well organized and financed but they were exceptions. For an example of a segregationist academy with a new physical plant and a substantial budget, see Deposition of Dillon, Administrator of Pillow Academy of Greenwood, Mississippi.

[14]Indeed, the record shows that such districts were generally desegregated without litigation and at least one year in advance of compliance in other parts of the state. Biloxi Municipal Separate, one of the districts in the original school desegregation cases of 1963-64, is 85% white and without any private academy. It desegregated all twelve grades under freedom of choice by the 1966-67 school year although it could have easily obtained a stay until the 1967-68 school year. (Henderson Deposition, Exhibit 11.)

officials have provided no leadership for desegregation and blacks constitute a larger percentage of the student population, the implementation of freedom of choice or terminal plans of pupil assignment triggered the decimation of the white public school enrollment and the resegregation of public schools.

The following desegregation histories of specific school districts illustrate the pattern which emerged upon desegregation in *all* school districts wherein blacks constitute a substantial segment of the student enrollment.

1. *Holmes County School District*[15]

In September, 1965, the United States District Court for the Southern District of Mississippi ordered Holmes County to desegregate grades 1-4 under freedom of choice. Concurrently three private academies (Central Holmes Academy, Cruger-Tchula Academy, East Holmes Academy), limited to grades 1-4 or 1-6 and enrolling approximately 450 students, were opened. By the close of the 1967-68 school year, when the Holmes County system was desegregated under freedom of choice for all twelve grades, the private schools had expanded their program to twelve grades and their combined enrollment to 650 white students.

Holmes County desegregated its schools under a terminal plan in September, 1970.[16] At that moment one

[15] The interdependence of public school desegregation and the formation and growth of private academies in Holmes County was discussed in *Coffey v. State Educational Finance Commission*, 296 F. Supp. 1389, 1391, n. 7 (S.D. Miss. 1969), and *Green v. Kennedy*, 309 F. Supp. 1127, 1133 (D.C. 1970).

[16] Holmes County was one of three districts consolidated under the *Alexander* caption which was given until September 1970 to implement a "terminal" plan.

additional private school opened in the county (Four County Academy) and all but a handfull of white students formerly enrolled in the county's public schools withdrew to attend private segregationist academies. Holmes County presently has two school systems: one public, staffed and attended by blacks; the other private, and staffed and attended by whites who abandoned the public schools upon this Court's mandate in *Alexander*. The appellees treat both school systems as equals under the state's textbook program. (Henderson Deposition, Exhibits 9 & 10; Chart, Interdependence of Public School Desegreation and the Formation & Growth of Private Academies.)

2 *Canton Municipal Separate School District*

The Canton Academy was opened in September, 1965 concurrently with the implementation of a freedom of choice plan for grades 1-4 in the public school system. At the close of the freedom of choice stage of desegregation (1968-69), the Canton Academy enrolled 140 students in curriculum limited to grades 1-8. On January 19, 1970, at the precise moment public schools opened under the terminal plan of pupil assignment mandated by this Court in *Alexander*, the Canton Academy expanded to serve grades 1-12. Its enrollment surged to 1,322, or virtually the entire white student body of the Canton Municipal Separate School District. At the same moment, the academy was moved into an abandoned tent factory with a staff of 20 white teachers who had left the public schools and with textbooks supplied by appellees herein. (The experience of the Tunica County system, wherein named plaintiffs attend school, was identical to that of Canton and Holmes County; *supra*, pp. 3-5).

3. *Jackson Municipal Separate School District*

Prior to the 1964-65 school year Jackson and the surrounding Hinds County counted only three white private academies.[17] All were limited to the elementary grades and their combined enrollment totaled 411. The 1964-65 school year witnessed the desegregation of grade one under freedom of choice and White Citizen's Council School #1 and Southside Academy opened as small elementary schools serving grades 1-4. In September, 1965, Jackson and Hinds County desegregated four grades under freedom of choice and announced that all twelve grades would be so desegregated by 1967-68. During the same month White Citizen's Council #1 expanded its program to all twelve grades and increased its enrollment from 25 to 103 students while Southwest Academy and First Presbyterian Day School opened for the first time. When all twelve grades of the public system had been desegregated in 1967-68, there were nine segregationist academies enrolling 1,250 students operating throughout Jackson and Hinds County.

Terminal plans of pupil assignment were implemented in Jackson and Hinds County in January and September, 1970. In September, 1969, the White Citizen's Council operated three schools enrolling 449 students. In January, 1970, enrollment at Council Schools rose to 2,920 and other groups opened three new academies. In September, 1970, when further changes in the plans of pupil assignment were implemented, the White Citizen's Council opened three new academies while other private groups opened two more. By the 1970-71 school year

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[17]St. Andrews Episcopal (integrated), Jackson Academy (opened in 1959) and Jackson Christian. (A. 40-41)

there were *at least* 18 private academies[18] enrolling over 10,000 students operating in the Jackson-Hinds County area.[19] Jackson public school officials recently explained the impact of private academies upon their system to the court:

> For this pattern is emerging: the Courts will attempt to achieve a percentage result on the basis of projected enrollments; these enrollments will be rendered inaccurate by continued loss of white students. . . .
>
> It is an undeniable fact that desegregation cannot be accomplished without the presence of white students in the public schools. Surely it is not absolutely necessary for a community to watch more than 40% of its white students leave the public schools [to attend private academies] in the space of one year. Enrollment of white students in the system was 20,966 in September, 1969 and 12,095 in September, 1970.[20]

4. *Amite County*

Amite County was one of the school districts consolidated in *Alexander v. Holmes County Board of Education, supra.* In January, 1970, upon remand from this Court, two private schools, the Amite County School Corporation and the Pine Hills Academy opened with

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[18]Examples of Jackson-Hinds academies receiving textbooks are: Woodland Hills Baptist, Terry, Bearss, Flowood.

[19]These 1970-71 statistics are estimates accepted by the district court.

[20] *Jackson Municipal Seperate School District v. Derek Jerome Singleton, cert. denied,* 402 U.S. 944 (1971); Petition for Writ of Certiorari, pp. 29-30.

enrollments of 597 and 426 white students respectively–virtually the entire white student population of the school district. (Henderson Deposition, Exhibit 9; Chart, Interdependence of Public School Desegregation and Formation and Growth of Private Academies; Nowell Deposition, pp. 5-6; Horne Deposition, p. 5.) The Amite County Private School houses grade one in the local Mormon Church, grades two and three in the Methodist and Presbyterian Churches, grades four and five in the "Old Baptist Parsonage," and grades seven through 12 in the Baptist Church.

5. *Indianola Municipal Separate School District*

Indianola Academy, serving grades 1-2 and enrolling 79 pupils, opened in September, 1965 concurrently with integration of grades 1-4 of the public schools under freedom of choice. As additional grades of the public schools were desegregated the academy added grades to its curriculum and students to its rolls so that by September, 1969, it housed 578 students in grades 1-12.

During the first semester of the 1969-70 school year the public school district enrolled 991 white students. However, in February, 1970, the district was required to implement a terminal plan of pupil assignment pursuant to *Green* and *Alexander*; and at that precise moment *all* white students and 30 white teachers of the district withdrew to the security of the segregated Indianola Academy. Accordingly, the Indianola Academy's enrollment surged from 578 white students in December, 1969 to 1,504 such students by February 9, 1970. (Cain Deposition, pp. 5, 9; Floyd Deposition, p. 13; Henderson Deposition, Exhibit 9; *Chart*, Interdependence of Public School Desegregation and the Growth of Private Academies.)

6. *Grenada Municipal Separate School District*

The failure of HEW to obtain voluntary desegregation of the Grenada public schools during the 1965-66 and 1966-67 school year resulted in the termination of all federal financial support for this district as of September 22, 1966. However, a court order was subsequently entered requiring freedom of choice desegregation for grades 1-12 effective September, 1967. Enter the Kirk Academy, in September, 1967, serving grades 1-12 and enrolling 133 students. This academy grew to an enrollment of 412 white students by September of 1969, to 511 by February of 1970, and to 639 by September, 1970.

Effective March 1, 1970, the public school district was required to implement a terminal plan of pupil assignment. On the same day a second private academy, Grenada Lake Academy, opened in an abandoned public school building for 180 white students formerly enrolled in Grenada public schools. (Jaudon Deposition, pp. 3, 5.)

The histories reviewed above are not exceptional. The pattern—public school desegregation followed by the withdrawal of a substantial number of white students to private academies and the resegregation of public schools—was repeated in school district after school district throughout the state.

III.

THE STATE'S TEXTBOOK PROGRAM

A. The Program Generally

Sections 6634-6659.5 of the Miss. Code of 1942 (Appendix B, Jurisdictional Statement) provide the framework for the selection, purchase and distribution of

textbooks used in the state's schools.[21] The laws were enacted in 1940 and amended, insignificantly, in 1942, 1944, 1946, 1960 and 1966. Prior to the initiation of the free textbook program, parents were required to purchase textbooks (§6511). Initially the Act provided textbooks for the elementary curriculum only; in 1942, the legislature extended the program to high school grades (§6658).

Sections 6634 and 6641 establish the Mississippi Textbook Purchasing Board and assign to that agency plenary authority over the state's multi-faceted program. Board members are the Governor, the State Superintendent of Education, and three others—who must have served 5 years in public schools of the State—appointed by the Governor for terms of four years. The Board employs an Executive Secretary who serves as full-time administrator. All members of the Board and the Executive Secretary are appellees herein.

Textbooks may only be purchased "for use in those courses set up in the state course of study adopted by the State Board of Education, or courses established by special acts of the legislature" (§6646). For each such course of study there is a "rating committee" consisting of educators, and other "persons competent in the appraisal of books" appointed by the Governor and State Superintendent of Education (§6641(d)). No textbook may be adopted or purchased by the appellees unless it is first approved by the responsible rating committee.

Once approved, textbooks are purchased under contracts between appellees and publishers at a price

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[21] The following nine states provide free textbooks to private schools: California, Connecticut, Louisiana, Mississippi, Nebraska, New Jersey, New Mexico, New York, Rhode Island.

"not . . . higher than the lowest prices at which the same books are being sold elsewhere in the United States" (§6646(1)). The publishers are required to "maintain a depository at a place within Mississippi to be named by the Board [Jackson] where a stock of books sufficient to meet all reasonable and immediate demands [is]kept" (§6641(f)).

Appellees send to each school district (and now each private school)[22] requisition forms which list all textbooks available free through the state. The school district or private school completes the requisition form and returns it to the Purchasing Board where it is

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[22]Prior to 1970 each County Superintendent of Education was required to requisition textbooks for all schools, *public and private*, geographically located within his county. The requisition was then approved by the Textbook Purchasing Board and thereafter shipment was made by the School Book Depository directly to the consignee specified by the County Superintendent of Education.

In 1970 Congress enacted the Emergency School Assistance Act appropriating funds to aid school districts converting to unitary systems. The act made it unlawful for any recipient to "engage . . . in the gift, lease or sale of real or personal property or services to a non-public elementary or secondary school or school system practicing discrimination on the basis of race, color or national origin." P.L. 91-381, 84 Stat. 806, U.S. Code Congressional and Administrative News, September 5, 1970, pp. 3318-3319. Public school officials wishing to participate in this federal program were forced to disassociate themselves from the private segregationist academies. As a result, the Textbook Board, in 1970, established new distribution regulations which eliminated County Superintendents as conduits for the distribution of textbooks to private academies. The distribution regulations are reproduced in the district court's opinion, footnote 2, Appendix A, pp. 5a-6a, Jurisdictional Statement. *Norwood v. Harrison*, 340 F.Supp. at 1006.

reviewed by the Executive Secretary. After approval, the form is sent to the Textbook Depository in Jackson which fills the order and ships the textbooks directly to the school district or private school. All shipping charges are billed to the Textbook Purchasing Board (§§6641(f)).

B. The Extent of Textbook Aid to Private Racially Segregated Academies.

Appendix A hereto lists the 107 academies which receive textbooks from the State of Mississippi and which were found by the district court to have been "formed throughout the state since the inception of public school desegregation."

During the 1970-71 school year these academies enrolled approximately 34,000 students and held 175,000 volumes costing the state of Mississippi approximately $490,000. The annual per pupil expenditure for new or replacement textbooks approximates $6.00, which will result in an annual recurring state expenditure for these academies of approximately $207,000. The total expenditure for textbooks by the appellee board for the 1970-71 school year was $2,819,070 (Snowden Deposition, Exhibit 12).

The district court found that there are 8,000 students enrolled in an additional 41 private segregationist academies which do not, at this time, participate in the state's program. Accordingly, an additional $120,000 in

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[23]There is, of course, an additional recurring and significant expenditure by the state for the shipment of textbooks from Jackson to private schools (§6641(1)(f), Appendix B, Jurisdictional Statement).

initial inventories and $50,000.00 annually thereafter is available to private segregationist academies.[24]

SUMMARY OF ARGUMENT

The provision of state owned textbooks to the private segregated academies of Mississippi is in conflict with appellee's affirmative duty to promote racially integrated public schools and constitutes significant state aid to racial segregation in violation of the Equal Protection Clause. Neither the absence of a specific intent by the legislature to aid the segregationist academies nor the absence of proof that textbook aid is vital to such academies relieves the state of its Equal Protection obligation not to support segregation.

The lower court's reliance upon the distinction between aid to the student and aid to the school, recognized by this Court in First Amendment cases, was improper because the standards for reviewing state aid in the context of Fourteenth Amendment and First Amendment challenges differ substantially.

ARGUMENT

The decision of the court below upholds the action of the State of Mississippi in providing financial assistance to buy textbooks for pupils attending almost 150 racially segregated private schools which were formed to promote evasion of public school desegregation in the State. The court below held inapplicable prior precedents striking

[24]The Executive Secretary testified that the program was not administered strictly on a per pupil allotment basis. Rather, they sought to provide all textbooks requested and a school could exceed its allotment by merely filing a supplemental requisition.

down as unconstitutional other forms of state aid to these same segregationist academies. It upheld the supplying of textbooks, bought with tax money and distributed by state officials to these segregationist institutions, on the grounds that the state acted under a statute which had no racial motive, that the textbook aid was not essential to continued operation of the segregationist academies, and that similar aid has been held consistent with the Establishment of Religion Clause of the First Amendment.

We believe that the first ground is legally insufficient. The second ground is both incorrect and legally irrelevant because the Constitution forbids all public support of school segregation. *Cooper v. Aaron*, 358 U.S. 1, 19 (1958). The third ground relating to the Establishment Clause is not decisive of racial discrimination issues under the Equal Protection Clause.[25]

The State of Mississippi and all of its agencies must be guided by their "affirmative" and continuing duty to remedy and undo the effects of past racial discrimination and convert school systems from dual to unitary operation. The provision of free textbooks to academies which drain public schools of white students and faculty and which thereby frustrate the attainment of fully integrated public schools is inconsistent with this paramount duty.

In *Green v. County School Board of New Kent County*, 391 U.S. 430, 437-38, the Court was confronted

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[25] Relying on Judge Coleman's opinion in this case, a district court in Louisiana has approved state textbook *and transportation* aid for the segregationist academies of that state. *Jo Ann Grgham v. Evangeline Parish School Board*, Civil Action No. 11053, W.D. La., July 28, 1972, *appeal pending*, 5th Cir. No. 72-3033.

with the very argument relied upon by the court below. There the defendant school board asserted that its only duty under the Equal Protection Clause was to adopt a neutral stance and permit "every student regardless of race . . . [to] 'freely' choose the school he will attend." The Court held that the state could not remedy its long history of support and encouragement for racial segregation by standing neutrally aside. Rather, state agencies were charged with an "affirmative" duty to take whatever steps might be necessary to convert to a unitary system.[26]

This mandate which commands appellees to align themselves unequivocally with public integrated education was recently imposed upon the federal government in *Green v. Kennedy*, 309 F.Supp. 1127 (D. D.C. 1970), *appeal dismissed for want of jurisdiction, sub nom. Cannon v. Green*, 398 U.S. 956 (1970); and see *Green v. Connally*, 330 F.Supp. 1150 (D. D.C. 1971), *affirmed sub nom. Coit v. Green*, 404 U.S. 997 (1971).[27] There

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[26]In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Court again relying upon the state's duty to formulate a meaningful remedy for past policies and practices of segregation, upheld the use of a variety of techniques aimed at uprooting an entrenched dual system. In *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971), a statute tending to interfere with the formulation of a remedy for racial segregation was held unconstitutional.

See also *United States v. Jefferson County Board of Education*, 372 F.2d 836, 869, *affirmed en banc*, 380 F.2d 385 (5th Cir. 1967);

"The only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration." (Emphasis in original)

[27]See also *Adams v. Richardson*, ___ F. Supp. ___ (D. D.C. 1972).

the Court was confronted with mere indirect aid to private academies and with a neutral statute enacted without any discriminatory motive. The Court held on motion for preliminary injunction—[28]that donations to segregationist academies of Mississippi could not be offset against income as charitable contributions for federal income tax purposes because:

> Where there is a showing, as here, that a dual system of segregated schools was established and maintained in the past either under State mandate or with substantial help from State involvement and support, the State and the school districts are under a present, continuing and affirmative duty to establish a "unitary, non-racial system of public education * * * a system without a 'white' school and a 'Negro' school, but just schools." * * * The Federal Government is not constitutionally free to frustrate the only constitutionally permissible state policy, of a unitary school system, by providing government support for endeavors to continue under private auspices the kind of racially segregated dual system that the state formerly supported. (*Green v. Kennedy*, 309 F.Supp. 1127 at 1137) (Emphasis added).

The affirmative duty principle of *Green, supra,* underlies the recent decisions of this Court holding that the constitutionality of a state policy in the context of dual school systems is measured by "whether it hinders or furthers the process of school desegregation." *Wright v. City of Emporia,* 407 U.S. 451 (1972). The same affirmative duty principle underlies the decisions of this Court holding unconstitutional legislation providing

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[28]The final decision reached the same result on statutory rather than constitutional grounds, but the decision has obvious strong constitutional overtones. See *Coit v. Green, supra.*

tuition grants for students attending private segregated academies. *Brown v. South Carolina Board of Education*, 296 F.Supp. 199 (D. S.C. 1968), *affirmed per curiam*, 393 U.S. 222 (1968); *Poindexter v. Louisiana Finance Commission*, 275 F.Supp. 833 (E.D. La. 1967), *affirmed per curiam*, 389 U.S. 571 (1968). See *Wallace v. United States*, 389 U.S. 215 (1967), *affirming Lee v. Macon County Board of Education*, 267 F.Supp. 458, 475 (M.D. Ala. 1967). And relying entirely upon this Court's decisions in *Brown* and *Poindexter*, a district court stated the rule of law in *Griffin v. State Board of Education*, 296 F.Supp. 1178, 1181 (E.D. Va. 1969):

> "[T]he validity of a tuition plan is to be tried on a severer issue: whether the arrangement in *any* measure, no matter how slight, contributes to or permits continuance of segregated public school education.
>
> * * * * *
>
> To repeat, our translation of the imprimatur placed upon *Poindexter* by the final authority is that any assist *whatever* by the State towards provision of a racially segregated education, exceeds the pale of tolerance demarked by the Constitution. In our judgment, it follows that neither motive nor purpose is an indispensable element of the breach. The *effect* of the state's contribution is a sufficient determinant. . . ." (Emphasis in original)

Under this test the Court held that the Virginia statutes were void:

> Indisputably, the State supplies the money; it comes from the public treasury; it goes to individual residents who may expend it for a segregated classroom. Thus, the Virginia payments are made available to help in giving life to an educational forum decried by the Federal Constitution. . . .

> An absolute and unequivocal prohibition is the logical effectuation of the intendment flowing from the recent rulings of the Supreme Court.... (*Griffin supra*, at 1181)

The courts have similarly outlawed a variety of other forms of public aid to private racially segregated schools. See *Wright v. City of Brighton*, 441 F.2d 447 (5th Cir.), *cert. denied sub nom. Hoover Academy, Inc. v. Wright*, 404 U.S. 915 (1971); *Aaron v. Cooper*, 261 F.2d 97 (8th Cir. 1958); *United States v. H inds County School Board*, 433 F.2d 598 (5th Cir. 1969). *Accord: Blackwell v. Anguilla Line Consolidated School Dist.*, No. 28030 (5th Cir., Nov. 24, 1969) ("No abandoned school facility under this plan, if any, shall be used for private school purposes"); *United States v. Covington County School Dist.*, No. 28030 (5th Cir., Dec. 17, 1969) ("It is further ordered that the Lincoln Elementary School facility shall not be used, leased, or sold for private school purposes"); *Anderson v. Canton Municipal Separate School Dist. & Madison County School Dist.*, No. 28030 (5th Cir., Dec. 22, 1969) (rule to show cause why injunction should not issue); *Lemon v. Bossier Parish School Board*, Civ. No. 10,687 (W.D. La., Sept. 25, 1970) (granting injunction against use of public school athletic field for game between two private schools; field had been leased by Lions Club, sponsor of game); *Taylor v. Coahoma County School District*, 345 F.Supp. 891 (N.D. Miss. 1972); *Gilmore v. City of Montgomery*, 337 F.Supp. 22 (M.D. Ala. 1972).

The proper inquiry, then, is whether state textbook aid "contributes to" or "furthers" (*Griffin, supra, Emporia, supra*) public school segregation. The question almost answers itself: textbook aid enables private segregationist academies operating on the "thinnest

financial basis" (*Coffey, supra,* 296 F.Supp. 1389, 1392 (S.D. Miss. 1969)) to avoid expending sums for a vital aspect of their educational programs; it obviously aids the segregationist schemes to have textbooks selected, purchased and distributed by the State. And it places the State's "power, property and prestige behind the . . . discrimination," (*Burton v. Wilmington Parking Authority,* 365 U.S. 715, 725 (1961)), thereby frustrating the paramount objective of the Fourteenth Amendment.

In the face of these authorities the district court has held that, to prevail, plaintiffs must prove textbook aid vital to segregationist academies, *i.e.*, that whites would return to public schools if only textbooks were withdrawn. *Norwood v. Harrison,* 340 F.Supp. at 1013. However, in neither the tuition grant nor tax exemption case was there any evidence that whites would return to public schools if only such benefits were terminated. In fact, segregationist academies persisted *after* tuition grants and tax exemptions were withdrawn. Accordingly, the district court's standard would argue for the restoration of tuition grants and tax benefits to the academies of Mississippi. The absurdity of this result and the authorities cited above are sufficient answer to the test advanced by the district court.

Moreover, the Equal Protection inquiry is *not* whether the state by withdrawing aid can destroy private racial discrimination; rather the question is whether the state is lending its support to racial discrimination "through any arrangement, management, funds or property." *Cooper v. Aaron,* 358 U.S. 1, 19 (1958). *Palmer v. Thompson,* 403 U.S. 217 (1971); *Anderson v. Martin,* 375 U.S. 399 (1964); *Reitman v. Mulkey,* 387 U.S. 369 (1967); *Burton v. Wilmington Parking Authority, supra; Shelley v. Kraemer,* 334 U.S. 1 (1948). Judge Bazelon phrased it thusly in holding tax benefits to segregated fraternal orders unconstitutional:

> We have no illusion that our holding today will put an end to racial discrimination or significantly dismantle the social and economic barriers that may be more subtle, but are surely no less destructive. Individuals may retain their own beliefs, however odious or offensive. But the Supreme Court has declared that the Constitution forbids the Government from supporting and encouraging such beliefs. By eliminating one more of the "nonobvious involvements of the State in private conduct" we obey the Court's command to quarantine racism. (Citing *Burton, supra.*) *McGlotten v. Connally*, 338 F.Supp. 448, 462 (D. D.C. 1972).

The district court also upheld Mississippi's textbook statute on the grounds that the statute is neutral on its face and devoid of any purpose to aid private segregationist academies. But this Court has made it abundantly clear that state legislation and policy, especially in the field of education and in the context of a state converting from dual to unitary operation, must be measured by its effect rather than its purpose:

> [A]n inquiry into the "dominant" motivation of school authorities is as irrelevant as it is fruitless. The mandate of *Brown II* was to desegregate schools and we have said that "the measure of any desegregation plan is its effectiveness." . . . Thus, we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect. *Wright v. Council of the City of Emporia, supra*, 407 U.S. 451 (1972). (Citing *Palmer, supra*, 403 U.S. at 225.)

The district court's holding, that aid to students (as opposed to schools) shields the state from an Equal Protection challenge, is transparent. "[I]t is the right of the State . . . to make, and not the right of the pupils, parents or schools to take" the textbook grants which is at issue. *Griffin v. State Board of Education*, 239 F.Supp. 560, 563 (E.D. Va. 1965). All of the tuition grant legislation provided grants directly to students and not to schools and all such legislation has been held unconstitutional by this Court. Although the distinction between aid to a student and aid to a school may be relevant in the context of aid to parochial education and the First Amendment, it finds no support in the Equal Protection decisions of this Court.

This Court has never confused or found interchangeable equal protection and establishment of religion standards. Thus, a "federal construction grant to a hospital operated by a religious order" is not unconstitutional (*Tilton v. Richardson*, 403 U.S. 672, 679 (1971) (opinion of the Chief Justice, citing *Bradford v. Roberts*, 175 U.S. 291 (1899), but racial discrimination by a hospital so constructed is unconstitutional (*Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959, (4th Cir., 1963), *cert. denied* 376 U.S. 938 (1963). And in *Lemon v. Kurtzman*, 403 U.S. 602, 611. f.n. 5, 671, f.n. 2, the Chief Justice, speaking for the Court, and Mr. Justice White, both recognize that the considerations controlling in establishment of religion cases are quite distinct from those controlling in equal protection cases.[29]

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[29] "[I]f the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds . . . the legislation would to that extent be unconstitutional." *Lemon, supra*, 403 U.S. at 671, f.n. 2.

Board of Education v. Allen, supra, 392 U.S. at 245 and cognate Establishment Clause cases proceed from the premise that "religious schools pursue two goals, religious instruction and secular education," and that the State may assist the second so long as it does not thereby become entangled in the first. The function of the "entanglement" doctrine and the aid "to student vs. school" distinction is to identify the line between the two missions of a parochial school, and to keep the state on the permissible side—the secular side—of the line. But education and segregation are inextricably interwoven in a school restricted to whites; and there can be no permissible role for the State in such a school. "Entanglement" doctrines and aid to "student vs. school" distinctions are therefore meaningless in an Equal Protection Clause context—as a comparison of *Allen, supra,* and *Lemon, supra,* makes clear. The Court distinguished textbooks from teachers in those First Amendment cases primarily because a textbook could be confined to its secular role but a teacher could not. A similar distinction for Equal Protection purposes would be inconceivable: state-paid teachers and state-paid textbooks reserved for whites in a school that excludes blacks *both* violate the Equal Protection Clause *if either does.* The rules for First Amendment cases, therefore, cannot rationally be mirrored in racial segregation cases; the issues are, very simply, noncomparable.

The First Amendment is designed to protect religion: it recognizes the value of religion, as nothing in the Constitution recognizes any value in racial discrimination. Under the First Amendment, the State may no more forbid parochial schools than it may establish them; and its denial of generally available benefits to parochial school students because they attend parochial schools

would at least trench upon, if it would not invade, Free Exercise concerns. *Cf. Sherbert v. Verner*, 374 U.S. 398 (1963). This consideration no doubt informs both the reference in *Allen* (392 U.S., at 245-47) to *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Allen*'s conclusion that the "line between state neutrality to religion and state support of religion is not easy to locate" (392 U.S. at 242).

However, while the State must tolerate religious instruction in private educational institutions, it need not tolerate racial discrimination by them (*cf. Allen, supra*, 392 U.S. at 247); and a segregated school—especially one providing whites with an alternative to public integrated schools—unlike a religious school, can invoke no legitimate interest that the State may even acknowledge. Moreover, religious schools may well perform, "in addition to their sectarian function, the task of secular education," (*Allen, supra*, 392 U.S. at 248), and thereby "serve a 'public purpose'." But schools which exclude blacks and provide a segregationist alternative to public schools serve no public purpose that the Equal Protection Clause allows; and an underwriting of any part of their segregated educational function by the State is constitutionally forbidden.

In short, the court below was plainly wrong in holding that the present case could be resolved by reference to *Allen* and First Amendment principles.

CONCLUSION

For the foregoing reasons the opinion and judgment of the court below should be reversed and the case remanded with instructions to enter an order enjoining appellees from distributing textbooks to the private segregated academies of Mississippi.

Respectfully submitted,

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APPENDIX A*

PRIVATE NON-SECTARIAN ACADEMIES PARTICIPATING IN STATE'S TEXTBOOK PROGRAM[1] 1970-71

Name of School[2]	Number of Books	Cost to State	Number of Students[3]
1. Adams County Christian	3,452	$ 8,918.07	535
2. Adams County Private	2,513	8,327.34	1,006
3. Amite School Corporation	3,950	11,875.26	581
4. Bearss Academy	417	1,146.18	117
5. Beeson, J.A. Academy	1,531	4,229.04	265
6. Benton Academy	3,148	8,432.85	421
7. Bentonia Academy	874	1,951.35	82
8. Brandon Academy	3,912	11,447.46	589
9. Brookhaven Academy	2,675	6,457.74	307
10. Calhoun Academy	294	655.14	127
11. Canton Academy	8,437	25,506.60	1,225
12. Carroll Academy	358	1,084.83	305
13. Central Academy	1,858	5,329.29	751
14. Central Delta Academy	1,933	4,878.66	216
15. Central Holmes	3,861	12,787.11	501
16. Centreville Academy	3,750	10,295.55	407
17. Chamberlain Hunt Academy	829	3,398.82	360
18. Chickasaw Academy	1,420	3,586.17	164
19. Children's Academy (The)	726	2,588.70	148
20. Christ Episcopal Day School	2,075	5,218.28	265
21. Citizens School	1,776	4,589.91	255
22. Claiborne Educational Foundation	2,032	4,792.38	253
23. Clarke Academy	387	1,478.04	340
24. Clarksdale Baptist	2,356	5,937.45	427
25. College Hill Academy	513	1,701.51	199
26. Columbia Academy	1,514	4,914.35	379
27. Copiah Academy	2,472	7,312.20	483
28. Covington School Foundation	512	1,494.36	75
29. Cruger-Tchula Academy	2,299	7,712.64	438
30. Deer Creek School	1,821	5,126.76	496
31. East Holmes Academy	2,776	7,791.60	619
32. East Lowndes Academy	1,745	5,056.02	247
33. East Rankin Academy	1,341	3,149.16	180
34. First Baptist Parochial	630	1,499.64	78
35. First United Methodist	1,305	3,029.25	169
36. Flowood Academy	443	1,251.93	227
37. Four County Academy	815	1,905.90	76
38. Gospel Lighthouse Crhistian	119	472.95	22
39. Gray Academy	1,320	3,932.43	177

*This Appendix is identical to Appendix "D" of the Jurisdictional Statement except that schools have been arranged in alphabetical order.

[1]This Appendix derives entirely from compilation filed by appellees in the District Court (entered by order of District Court, August 9, 1971). (A. 32-37)

[2]The District Court found that all of the "church schools" recorded herein are essentially non-sectarian and were formed in response to the desegregation of public schools.

[3]All students (and all faculty members) are white except for "15 Chinese, 16 Oriental, 2 Indians and 2 Latin American" students.

40. Greenwood Private Jr. High	1,160	4,288.95	330
41. Grenada Lake Academy	2,523	7,119.58	381
42. Happy Day School	652	884.73	110
43. Heidelberg Baptist Academy	1,993	5,557.50	295
44. Heritage Academy	1,593	4,029.81	350
45. Highway Baptist School	1,304	2,839.83	104
46. Hillcrest Academy	547	1,495.26	165
47. Humphreys Academy	3,480	10,000.71	398
48. Indianola Academy	7,985	24,029.01	1,209
49. Jackson Academy	3,071	6,652.56	575
50. Jefferson Davis Academy	1,054	3,701.10	356
51. Jesus Name Faith	85	170.70	44
52. Kemper Academy	3,849	10,654.85	432
53. Kirk Academy	842	3,061.74	639
54. Lawrence County Academy	717	2,149.32	177
55. Leake Academy	2,369	6,809.19	500
56. Live Oak Academy	218	822.21	412
57. M & L Academy	844	2,013.18	42
58. Magnolia Heights	1,930	5,674.80	228
59. Madison-Ridgeland Academy	448	1,151.01	136
60. Manchester Academy	1,004	2,356.92	550
61. Marshall Academy	1,153	3,012.36	600
62. Montgomery Carroll Academy	699	1,629.49	174
63. Mount Pleasant Christian Academy	1,254	3,498.30	149
64. Newton County Academy	887	2,046.92	78
65. North Central Miss. Schools	723	1,602.87	67
66. North Delta Schools, Inc.	1,021	3,373.19	268
67. North Miss. Academy	442	1,230.96	95
68. North Sunflower Academy	2,243	7,841.28	626
69. Northwest Academy	1,613	4,347.15	239
70. Oak Hill Academy	2,348	6,739.17	450
71. Paynes Academy	1,288	3,635.73	96
72. Parklane Academy	1,539	3,887.01	228
73. Pearl River Academy	660	1,209.06	104
74. Pheba Academy	675	1,636.14	133
75. Pillow Academy	2,453	7,802.87	1,189
76. Pine Hills Academy	1,839	5,194.44	328
77. Pines Academy	156	404.82	44
78. Pioneer Academy	438	922.65	45
79. Prentiss Christian Schools	779	1,975.95	180
80. Presbyterian Day School	264	576.45	135
81. Presbyterian Day School	1,247	2,323.11	141
82. Quitman County Educational Foundation	727	3,008.91	480
83. Rankin Academy	1,510	5,302.47	284
84. Saint George Episcopal	1,340	2,885.54	169
85. Saint John's Day School	1,130	2,465.85	184
86. SanFord Academy	787	2,277.54	136
87. Scott County Christian	2,235	6,325.58	320
88. Sharkey-Issaquena Academy	1,051	3,815.35	664
89. Shaw Educational Foundation	1,480	4,443.00	905
90. Simpson Academy	1,266	3,427.89	270
91. Southwest Academy	1,167	2,649.12	131
92. Southwest Christian Academy	564	1,689.09	361
93. Starkville Academy	3,229	9,562.77	553
94. Sylvarena Baptist Academy	1,671	4,255.77	236
95. Terry Academy	1,378	3,884.61	157
96. Tri-County Academy	1,217	4,327.71	438
97. Tunica Institute	2,189	6,851.52	495
98. Union Private	1,578	4,526.16	202
99. Walnut Hills School	317	816.42	114

100. Wayne County School Foundation	814	2,064.21	103
101. West Marion Academy	2,073	6,336.78	383
102. Westminister Academy	252	773.86	132
103. West Panola School	1,143	3,134.67	203
104. West Tallahatchie Academy	666	1,856.85	178
105. Wilkinson County Christian	4,002	11,359.74	404
106. Winston Academy	1,781	5,036.76	288
107. Woodland Hills Baptist Academy	2,279	5,598.42	428
TOTALS	173,424	$490,292.39	34,532

APPENDIX B [1]

STATEWIDE ENROLLMENTS

	Private Non-Sectarian				Public	
	Total Enrollment	Change	No. of Schools	No. of Schools Opened for First Time		Change
1963-64	2,362		17[3]		570,000	
1964-65	2,408	+ 46	21	4	576,000	+ 6,000
1965-66	3,841	+ 1,433	41	20	583,000	+ 7,000
1966-67	5,452	+ 1,611	49	8	582,500	- 500
1967-68	6,546	+ 1,094	58	9	582,500	—
1968-69	9,064	+ 2,518	69	11	581,500	- 1,000
1969-70	30,939	+21,875	124	55	550,500	-31,000
Sept. 1970	42,000[2]	+11,061	155	31	534,500	-16,000

[1] This Appendix derives entirely from an exhibit offered and received into evidence by supplemental order of District Court.

[2] Estimate based on stipulation; the exact figure lies somewhere between 41,000 and 43,000.

[3] See page 9, f.n. 7, of this brief for a further breakdown of 1963-64 enrollment statistics.

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Civil Rights Act of 1964, 78 Stat. 241, *et seq.*:
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Sec. 601, 42 U.S.C. 2000d---------- 1
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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–77

DELORES NORWOOD, ET AL., APPELLANTS

v.

D. L. HARRISON, SR., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the distribution of state-owned textbooks to private racially segregated schools, formed to avoid the effective desegregation of the public schools, should have been enjoined as action in violation of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

The United States is responsible for enforcing school desegregation under the 1964 Civil Rights Act, 42 U.S.C. 2000c–6, 2000d, and 2000h–2. In furtherance of that responsibility, the United States has participated in desegregation actions involving more than

seventy school districts in the State of Mississippi and other litigation, such as *Coffey and United States* v. *State Educational Finance Commission,* 296 F. Supp. 1389 (S.D. Miss.), and *United States* v. *Tunica County School District,* 323 F. Supp. 1019 (N.D. Miss.), affirmed, 440 F.2d 377 (C.A. 5), contesting various forms of state aid to private segregated schools. In addition, federal statutes [1] and regulations [2] specifically prohibit recipients of Emergency School Assistance Program (ESAP) funds from providing aid to nonpublic schools which practice racial discrimination. The government's enforcement responsibility under the above statutes, cases and regulations, includes taking action to prevent States from providing support or aid to racially segregated schools in violation of the Equal Protection Clause of the Fourteenth Amendment.

Although the government did not participate in this case in the court below, the issues presented are related to those presented in cases where the government is a party.[3] The outcome here will thus directly affect the government's enforcement responsibilities under federal law. Our participation here as *amicus* is consistent with the government's participation in such other school desegregation cases as *Brown* v. *Board*

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[1] Office of Education Appropriation Act, 1971, Pub. L. 91-380, 84 Stat. 800.

[2] 45 C.F.R. Part 181, 36 Fed. Reg. 16546 (1971).

[3] The United States is appellant in *Graham and United States* v. *Evangeline Parish School Board*, No. 72-3033 (C.A. 5, appeal pending), involving a similar scheme for the distribution of textbooks and, additionally, the provision of transportation to students attending a private segregated school in Evangeline Parish, Louisiana.

of Education, 347 U.S. 483; *Brown* v. *Board of Education*, 349 U.S. 294; *Cooper* v. *Aaron*, 358 U.S. 1; *Goss* v. *Board of Education*, 373 U.S. 683; *Green* v. *County School Board of New Kent County*, 391 U.S. 430; *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1; and *Wright* v. *Council of the City of Emporia*, 407 U.S. 451.

STATEMENT

Since the parties have dealt extensively with the factual record, we include here only a brief review of the background of the case, and a summary statement of the evidence.

While the issue raised on this appeal was presented to the district court by means of a separate complaint and hearing, the complaint was filed by parents of children in Tunica County school district (App. 20), which has a long history of school desegregation litigation, and the contested action by the defendant state officials occurred at a time when substantial statewide desegregation was imminent. Consequently, much of the factual record here is also contained in the record of the desegregation litigation involving the Tunica County schools, and the purpose and effect of the contested state action here can be more fully evaluated with reference to the circumstances in the 1969–1970 school year reflected in the records of desegregation cases throughout the State. The circumstances at that time in Tunica County, where the appellants reside, were described by the district court

in *United States* v. *Tunica County School District*, 323 F. Supp. 1019, 1023 (N.D. Miss.), affirmed, 440 F. 2d 377 (C.A. 5), as follows:

> On February 2, 1970, the first day of the second semester [when a terminal desegregation plan was to be implemented], no white child enrolled at any of the district schools. Instead, the Tunica Church School opened with an all-white faculty composed of 21 teachers, 18 of whom had refused reassignment in public schools and were paid the remainder of their salaries. * * * All or almost all of the 340 students attending the church school had been enrolled in the Tunica County public schools during the first semester, and none of the 428 white students attending the public schools during the first semester enrolled in them during the second semester. The Tunica Church School charged no tuition of its students and its teachers received no remuneration for their services during the second semester. * * * The students used the same textbooks which they kept in their possession after leaving the public schools [footnotes omitted].

While the district court in that case enjoined state salary payments to former public school teachers for teaching in the Tunica Church School (*id.* at 1028), the private plaintiffs' request for an injunction preventing the loan of textbooks to the students in the private school became moot when the Tunica Church School was disbanded and the books were returned to the public school officials at the end of the 1969-1970 school year. 323 F. Supp. at 1025, n. 7, and 1028. When the Tunica County Institute of Learning

opened in the 1970–1971 school year, however, the county's white students, now enrolled in the Institute, were again provided textbooks by the State.[4] Consequently, the appellants filed the complaint in this action on October 9, 1970, alleging that the actions of the appellees frustrated the attainment of a "racially integrated and otherwise non-discriminatory public school system" in Tunica County and constituted unconstitutional "state aid and encouragement to racially segregated education * * *" (App. 21). Appellants sued as a class "in behalf of students throughout the state of Mississippi who are aggrieved by the policies and practices of defendants complained of herein" (App. 20), and requested relief which in effect would require appellees to recall textbooks distributed, and would prohibit further distribution of textbooks, for the use of students enrolled in private racially segregated schools in the State (App. 21–22). The request for relief was later refined by specifying 148 private segregated schools to be affected by the requested relief (Appellants' Brief, p. 6).

Appellants introduced evidence to show that the all-white private schools involved were formed from 1963 to 1970 in local school districts affected by impending

[4] In August 1970, the regulations governing textbook distributions were changed so books were provided directly to each private and parochial school, rather than being distributed through local public school superintendents, as before (Jan. 25, 1971 Dep. of Snowden, pp. 8, 39). The new procedure was designed to avoid federal restrictions on aid to racially segregated schools by recipients of federal educational assistance funds (July 6, 1971 Dep. of Snowden, p. 43). See Jurisdictional Statement, p. 15 n. 14; see also *infra*, p. 16.

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court-ordered desegregation plans.[5] The evidence further showed that these private schools were all-white (with a few children of other, non-black races, see App. 32–36) and had policies of racial exclusion,[6] that they were formed for the purpose of avoiding attendance by their students at public desegregated schools,[7] and that appellees were aware of the purpose of the schools.[8] Appellees had long provided textbooks for the use of students in both public and private schools under existing state statutes and regulations; but, in expectation of the mid-year opening of many all-white private schools after annual textbook allotments were exhausted, appellees adopted a scheme of distribution of textbooks which was contrary to their regulations because the organizers of the private schools were "going to need books."[9] Upon formation of the private schools, almost all of the white students in the public schools in some school districts withdrew to attend the newly formed all-white private schools.[10] Thus, the public schools, or some public schools, in these districts remained all, or virtually all, black.

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[5] (App. 44–49); J.S. App. 16a–17a. See, also, *Coffey and United States* v. *State Educational Finance Commission*, 296 F. Supp. 1389, 1391 (S.D. Miss.).

[6] See, *e.g.*, Dep. of McLean and Owen, p. 53; Dep. of Tinsley, p. 37; Dep. of Garrett, p. 11; Dep. of Mosely, p. 17; Dep. of Smithers, p. 14.

[7] See *e.g.*, Dep. of Daniels, pp. 10, 11; Dep. of Barbour, pp. 6, 7; Dep. of Isbell, pp. 17–23; Dep. of Wilson, pp. 5–7; Dep. of Boggan, p. 9.

[8] Ex. A to Dep. of Floyd.

[9] *Id.*

[10] See Appellants' Brief, pp. 14–19.

The court below assumed the accuracy of this evidence,[11] but considered it irrelevant, because the textbooks were distributed, under a long-standing statute enacted without racial motive, to all children "of whatever race * * * without question or impediment." J.S. App. 15a, 20a. The court found no inconsistency with the holding in *Green* [12] that the State has an affirmative obligation to convert to a unitary desegregated school system, because statewide less than ten percent of the student population attend private schools and because under the *Everson* [13] and *Allen* [14] decisions the provision of textbooks would not be considered impermissible state aid to the private schools. J.S. App. 15a–16a, 20a–21a.[15] Accordingly, relief was denied and the complaint dismissed.

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[11] While the district court did not make extensive, specific findings concerning the particular private schools at issue, in framing the question presented it said (J.S. App. 16a):

> We are thus brought to the point of determining whether the state's furnishing of free textbooks to students attending racially segregated schools is a support of such schools * * *.

[12] *Green* v. *County School Board of New Kent County*, 391 U.S. 430.

[13] *Everson* v. *Board of Education*, 330 U.S. 1.

[14] *Board of Education* v. *Allen*, 392 U.S. 236.

[15] The district court appears also to have been of the view that the provision of free textbooks should not be considered aid and encouragement to private schools because "[t]here is no showing that any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools, now unitary." J.S. App. 21a.

SUMMARY OF ARGUMENT

1. The district court's reliance on the line of cases involving state support of secular education in church-related schools is misplaced. That line of authority applies significantly different constitutional requirements than are involved here, and permits state support (within constitutional limitations) for the secular education provided in parochial schools as "productive of a benevolent neutrality" which properly reconciles the values reflected in the Establishment and Free Exercise Clauses of the First Amendment. *Walz* v. *Tax Commission,* 397 U.S. 664, 669. The Fourteenth Amendment, however, forbids state support of racially segregated schools "through any arrangement, management, funds or property * * *." *Cooper* v. *Aaron,* 358 U.S. 1, 19.

2. In determining whether a State has become impermissibly implicated in private discriminatory acts in violation of the Fourteenth Amendment, the courts consider the purpose, effect, and surrounding circumstances of the State's acts on a case by case basis. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715. The appellants here challenge the constitutionality of the Mississippi textbook statute as applied in relation to efforts to desegregate the State's public school systems. Therefore, the effects and circumstances relevant to decision here are those at the time of the statute's challenged applications, rather than at the time of its enactment. In applying the statute in this case, the State first ignored its regulations thereunder in order to assure the availability of free text-

books for use in segregated private schools opening in midterm, and then modified those regulations to avoid the intended non-discriminatory effects of a federal educational assistance program. Despite authority to do so, it has never attempted to condition the loan of textbooks on adoption by recipient schools of nondiscriminatory racial policies. In light of all the circumstances surrounding the establishment and operation of the segregated private schools at issue here, the State's furnishing of free textbooks for use in those schools impermissibly implicated it in private racial discrimination in violation of the Fourteenth Amendment.

3. The furnishing of textbooks challenged here also had the effect of impeding desegregation of the public schools in particular school districts. To the extent that it did so, it was inconsistent with the State's obligation under *Green* v. *County School Board of New Kent County*, 391 U.S. 430, to promote desegregated public education in converting from dual to unitary public school systems.

ARGUMENT

I. THE STANDARDS APPLIED IN TESTING STATE ACTION UNDER THE RELIGION CLAUSES OF THE FIRST AMENDMENT ARE NOT APPLICABLE IN THIS CASE

The district court erred, we submit, in relying on distinctions which this Court has articulated in cases involving the validity of educational assistance programs challenged under the First Amendment. There are significant differences between the constitutional standards of the Establishment and Free Exercise

Clauses governing the States' relationships with church-related education, on the one hand, and the standards of the Equal Protection Clause with respect to state involvement in racial discrimination, on the other hand.

The First Amendment prohibits any law "respecting an establishment of religion," and protects "the free exercise" of religion from governmental interference. In an attempt to steer a "neutral course between the two Religion Clauses," *Walz* v. *Tax Commission*, 397 U.S. 664, 668,[16] this Court has upheld state programs which, without excessive state entanglement and without discrimination, provide church-related schools with "government aid in the form of secular, neutral or non-ideological services, facilities, or materials * * *." *Tilton* v. *Richardson*, 403 U.S. 672, 687. Such programs are part of the States' "long history of amicable and effective relationships with church sponsored schools," *Wisconsin* v. *Yoder*, 406 U.S. 205, 236, and are consistent with the Establishment Clause. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612–613; *Tilton*, *supra*.

The policy of "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference," *Walz*, *supra*, 397 U.S. at 669, has no counterpart in the interpretation of the Equal Protection Clause. Racial discrimination by private persons, in contrast to the exercise of religion, enjoys no special constitutional immunity, and indeed is subject

[16] *Tilton* v. *Richardson*, 403 U.S. 672, 677, also refers to "the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause."

to special remedial legislative power under Section 2 of the Thirteenth Amendment, and is unlawful in many contexts.[17] The considerations relevant in cases under the Establishment and Free Exercise Clauses, therefore, bear little relation to the question whether state aid to racially segregated private schools is consistent with the Equal Protection Clause. This Court, in considering state action that supports private discrimination, has recognized the difference[18] and has declared unequivocally that state support of segregated schools "through any arrangement, management, funds or property cannot be squared with the [Fourteenth] Amendment * * *." *Cooper* v. *Aaron*, 358 U.S. 1, 19.

For these reasons, the decisions in cases involving the Religion Clauses (including *Board of Education* v. *Allen*, 392 U.S. 236) do not inform a court's judgment in a case, such as this, which is concerned with a very different constitutional requirement, and which does not involve private action under explicit

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[17] See, *e.g.*, *Griffin* v. *Breckenridge*, 403 U.S. 88; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409; 42 U.S.C. 2000a, *et seq.* (discrimination in public accommodations); 42 U.S.C. 2000e, *et seq.* (equal employment opportunity); 42 U.S.C. 3601, *et seq.* (fair housing); Executive Order 11063, 27 Fed. Reg. 11527 (1962) (equal opportunity in housing); Executive Order 11246, 30 Fed. Reg. 12319 (1965) (nondiscrimination by government contractors and subcontractors). Compare *Wisconsin* v. *Yoder*, 406 U.S. 205, 216; *Sherbert* v. *Verner*, 374 U.S. 398. See, also, *Pierce* v. *Society of Sisters*, 268 U.S. 510.

[18] Compare *Walz* v. *Tax Commission*, *supra*, with *Coit* v. *Green*, 404 U.S. 997, affirming *Green* v. *Connally*, 330 F. Supp. 1150 (D. D.C.). See also the concurring opinion of Mr. Justice White in *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 671 n. 2.

constitutional protection. The principles relevant to decision here are instead to be found in cases determining whether particular state action violates the Equal Protection Clause of the Fourteenth Amendment, and forbidding state support of racially segregated schools.

II. THE FURNISHING OF FREE TEXTBOOKS HERE CONSTITUTED IMPERMISSIBLE STATE INVOLVEMENT IN THE RACIAL DISCRIMINATION PRACTICED BY THE PRIVATE, SEGREGATED ACADEMIES

This Court has declined to attempt to fashion and apply a precise formula for identifying state responsibility under the Equal Protection Clause. Rather, the Court has said that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722. In judging particular state action, it is appropriate to consider facts showing "'* * * its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its [occurrence].'" *Reitman* v. *Mulkey*, 387 U.S. 369, 373. Thus, it is pertinent to isolate the specific state action which is challenged and to consider its historical context.

In our view, the court below erred in directing its attention here principally to the circumstances surrounding the enactment of the statute under which the state-owned textbooks were distributed. Appellants' complaint is not that the statute, as enacted, is unconstitutional; their contention is that it is un-

constitutional as applied. It is only the distribution of books by state officials to pupils at specifically named private segregated schools that is here challenged under the Equal Protection Clause. Hence, the history of the statute's enactment and prior application is largely irrelevant; it is instead the factual circumstances surrounding the particular challenged distribution of the books that should be "sifted" in determining whether the state involvement is constitutionally proscribed.

The relevant factual context here, therefore, is the process of implementation of the *Brown* decision in the Mississippi public schools. In 1963, when the first Mississippi school desegregation suits were filed (*Evers* v. *Jackson Municipal Separate School District*, 328 F. 2d 408 (C.A. 5)), there were only 17 private non-Catholic schools in the entire State (App. 40–41). In 1970, there were 155 (App. 42). The establishment and expansion of a private, segregated network of schools closely paralleled the ordering by the courts of effective desegregation of the public schools (App. 44–49). The State attempted to aid the persons participating in those private segregated schools through such measures as tuition grants; but all such attempts were invalidated by the federal courts. See, *e.g.*, *Coffey and United States* v. *State Educational Finance Commission*, 296 F. Supp. 1389 (S.D. Miss.); *Coffey and United States* v. *State Educational Finance Commission* (S.D. Miss., C.A. No. 3906, decided September 2, 1970) (unreported).[10]

[10] The second *Coffey* decision concerned a statute providing for tuition loans rather than grants. For cases involving similar legislation in other States, see *Griffin* v. *State Board of*

For the most part, the new private schools were established and operated on the "thinnest financial basis." *Coffey, supra,* 296 F. Supp. at 1392. Prior to 1969 there were 69 such schools operating in the State (App. 42). After this Court's decision in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, the number increased by fifty-five, with most opening in mid-term of the 1969–1970 school year (App. 42). After successful efforts in the spring and summer of 1970 by the Department of Justice and the Department of Health, Education, and Welfare to bring the remaining school districts in the State into compliance, an additional 31 private schools opened in September 1970 (App. 42).

Shortly after the *Alexander* decision, and in anticipation of the opening of a substantial number of

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Education, 239 F. Supp. 560 (E.D. Va.) (3-judge court); 296 F. Supp. 1178 (E.D. Va.) (3-judge court); *Lee* v. *Macon County Board of Education*, 231 F. Supp. 743 (M.D. Ala.) (3-judge court); 267 F. Supp. 458 (M.D. Ala.), affirmed *sub nom. Wallace* v. *United States*, 389 U.S. 215; *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42 (E.D. La.) (3-judge court), affirmed *per curiam*, 365 U.S. 569; *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La.) (3-judge court), affirmed *per curiam*, 368 U.S. 515; *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La.) (3-judge court), affirmed *per curiam*, 389 U.S. 571; *Poindexter* v. *Louisiana Financial Assistance Commission*, 296 F. Supp. 686 (E.D. La.) (3-judge court), affirmed *per curiam*, 393 U.S. 17; *Aaron* v. *McKinley*, 173 F. Supp. 944, 952 (E.D. Ark.) (3-judge court) affirmed *per curiam sub nom. Faubus* v. *Aaron*, 361 U.S. 197; *Brown* v. *South Carolina State Board of Education*, 296 F. Supp. 199 (D. S.C.), affirmed *per curiam*, 393 U.S. 222; *Hawkins* v. *North Carolina State Board of Education*, 11 Race Rel. L. Rep. 745 (W.D. N.C.) (3-judge court).

private segregated schools, the Executive Secretary of the Mississippi Textbook Purchasing Board circulated a memorandum to the local school superintendents, noting that "all the money has been allotted for this year," and therefore directing them "to transfer books with the student as he transfers to the private school * * *."[20] This was contrary to the state regulation, which provided that "upon [his] transfering to another school * * * all books shall be returned by the pupil * * *" (Pl. Ex. 12 to Jan. 25, 1971 Dep. of Snowden). Consequently, while most of the newly-formed private schools opened in makeshift facilities and with volunteer or underpaid faculty, their operation as schools was facilitated by this deviation from normal practice by the state officials responsible for textbook distribution. Moreover, the immediate availability of the same textbooks previously used enabled the students in the new segregated private schools to pursue essentially the same courses of study formerly provided them in the public schools, and thus facilitated the students' transfer by minimizing the resulting disruption of studies.[21]

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[20] Ex. A to Dep. of Floyd.

[21] A particularly flagrant example occurred in Tunica County, where the plaintiffs in this case reside. Upon desegregation at mid-term, the school board paid a semester's salary to 18 white teachers who resigned from the public school system and went to teach at the newly formed all-white private school (see p. 4, *supra*). In *United States* v. *Tunica County School District*, 323 F. Supp. 1019 (N.D. Miss.), affirmed, 440 F. 2d 377

State officials have also taken special measures to insure the continued provision of the textbooks to students in these private schools. When the distribution scheme followed for almost 30 years would have required either the termination of aid to segregated private schools or relinquishment of federal financial assistance to the public schools under the Emergency School Assistance Program established by Pub. L. 91–380, 84 Stat. 803–804, the distribution procedure was changed in August 1970 to establish separate accounts for the private schools.[22]

Although it has authority to "promulgate * * * rules as may be necessary for the proper administration of [the Textbooks Act]," Section 6641(1)(a), Miss. Code of 1942 Ann. (1972 Cum. Supp.), the Textbook Purchasing Board has never promulgated a regulation prohibiting recipient schools from discriminating on the basis of race or color. In similar circumstances the failure of the State to use its regulatory powers to pro-

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(C.A. 5), the district court described the situation as follows (323 F. Supp. at 1023):

"The church school held organized classes in which, for the most part, teachers and students met as they had during the first semester in the Tunica Elementary and High School * * *."

[22] Jan. 25, 1971 Dep. of Snowden, pp. 8, 39. Previously, orders were transmitted through and distribution was made through the local school superintendents, but the federal Act made it unlawful for recipients to participate in the transfer of property to segregated schools, Pub. L. 91–381, 84 Stat. 804. In spite of this change in the distribution procedure, the State Board still relies on the judgment of the local superintendents in determining whether a private school qualifies for free state textbooks (July 6, 1971 Dep. of Snowden, pp. 30, 43).

hibit racial discrimination by a lessee of State property violated the Equal Protection Clause, since "* * * no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be." *Burton, supra,* 365 U.S. at 725.

This case thus involves a continuous effort by State officials to encourage or facilitate the formation and continued operation of private segregated schools. The educational function performed by those institutions is one which the State would otherwise perform on an integrated basis. Compare *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 173, 175. Moreover, in contrast to the State regulatory functions involved in *Moose Lodge,* the State here has provided a valuable benefit which aids the schools in a manner directly related to their functioning specifically as schools.[23] Nothing in the opinion of the court below suggests the contrary.[24]

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[23] The provision here of free textbooks to the schools' students, to be used as the very implements of their education in these schools, contrasts with such matters as the provision of electrical and water services or police and fire protection to the schools on the same basis that those services are provided to all persons and facilities in the community. The provision of such neutral services to all does not implicate the State in the activities of the various recipients and therefore raises no constitutional question.

[24] The court's observation that there was no showing that any child, if deprived of free textbooks, would withdraw from a segregated school and re-enroll in the public schools (J.S. App. 21a) misconceives the quantum of state aid necessary to constitute a violation of the Equal Protection Clause. See *Cooper* v. *Aaron, supra,* 358 U.S. at 19; *Robinson* v. *Florida,* 378 U.S. 153; *Lombard* v. *Louisiana,* 373 U.S. 267; *Pennsylvania* v. *Board of Trusts,* 353 U.S. 230.

While the free textbooks statute is racially neutral on its face and "began without racial motivation" (J.S. App. 20a), the circumstances here reflect intentional state involvement in and support of the discriminatory actions of the private segregated schools.[25] The State is thus implicated in private discrimination in violation of the Equal Protection Clause, and the appellants are entitled to the relief requested.

III. THE FURNISHING OF TEXTBOOKS CHALLENGED IN THIS CASE IMPROPERLY AIDS PRIVATE SEGREGATED SCHOOLS WHICH HAVE ADVERSELY AFFECTED DESEGREGATION OF PUBLIC SCHOOLS IN SOME SCHOOL DISTRICTS OF THE STATE

Even if this Court were to disagree with our contention in Point II, *supra*, that appellants are entitled to the full measure of relief they are seeking, it should, at a minimum, order the district court to enjoin free textbook distribution for use in those private schools which have substantially impeded desegregation of the

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[25] Therefore, on this record, the provision of textbooks to these schools was not simply one of the "products of the State's traditional policy of benevolence toward charitable and educational institutions," *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833, 854 (E.D. La.), affirmed *per curiam*, 389 U.S. 571, or "the fruits of a benevolent racially neutral policy," *Poindexter* v. *Louisiana Financial Assistance Commission*, 296 F. Supp. 686, 687 (E.D. La.), affirmed *per curiam*, 393 U.S. 17. Instead, the assistance was "the product of the State's affirmative purposeful policy of fostering segregated schools and [had] the effect of encouraging discrimination." *Poindexter*, *supra*, 275 F. Supp. at 854. Thus, even under the language in the *Poindexter* cases cited by the district court (J.S. App. 18a–19a) in the particular circumstances shown here the provision of textbooks to the identified segregated schools constituted prohibited state involvement in private segregation.

public schools from which they have drawn students. In States, such as Mississippi, where racial segregation has previously been compelled by state law, State officials must act in a manner consistent with their obligation to promote a desegregated public education which is free of racial discrimination. *Green* v. *County School Board of New Kent County*, 391 U.S. 430. And in assessing their actions, even under long-standing, facially neutral statutes, "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect." *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 462. See, also, *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43.

Here, the court below minimized the effect of the private segregated schools on desegregation of the public schools by stating that 90 percent of the State's educable children continued to attend public schools (J.S. App. 20a–21a). But the record shows [26] that the effect of the operation of private segregated schools in some school districts has been the reestablishment of almost total racial segregation, with most white students in private schools and the black students in the public schools.[27] The withdrawal of white students from a school system does, of course, impede the desegregation process. *Wright, supra*, 407 U.S. at 463; *United States* v. *Scotland Neck Board of Education*, 407

[26] See Appellants' Brief, pp. 13–19; *United States* v. *Tunica County School District*, 323 F. Supp. 1019 (N.D. Miss.), affirmed, 440 F. 2d 377 (C.A. 5).

[27] "[W]e do not close our eyes to the facts in favor of theory. * * * [D]ual school systems must cease to exist in an objective sense as well as under the law." *Wright, supra*, 407 U.S. at 472 (Burger, C.J., dissenting).

U.S. 484, 490. And state officials are as responsible as local school officials for insuring effective desegregation of local school districts. *Scotland Neck, supra,* 407 U.S. at 488–489; *Lee* v. *Macon County Board of Education,* 267 F. Supp. 458, 475–476 (M.D. Ala.), affirmed *sub nom. Wallace* v. *United States,* 389 U.S. 215; *United States* v. *State of Texas,* 321 F. Supp. 1043, 1056–1057 (E.D. Texas), affirmed, 447 F. 2d 441 (C.A. 5), certiorari denied, 404 U.S. 1016.[28] In the present case, as in *Wright* and *Scotland Neck,* the determination of the constitutionality of a particular state action cannot be based simply on the overall, statewide effect of the action; its effect on desegregation in the particular local school district affected must be considered.[29]

To the extent, therefore, that the effect of the distribution of books for use in any particular schools was to aid in the continuation of a dual school system in particular school districts, appellants are clearly entitled to relief (see, *e.g.,* Appellants' Brief, pp. 14–19). For example, in Tunica County the establishment of Tunica Institute of Learning has resulted in the continuance of almost total racial segregation in the education provided in that school district. The record contains evidence showing the same or similar results

[28] See, also, *Edgar* v. *United States,* 404 U.S. 1206, 1207 (Black, J., opinion on application for stay).

[29] Desegregation can, indeed, be unconstitutionally impeded even if only part of a particular school district is denied a unitary system of education. *Davis* v. *Board of School Commissioners of Mobile County,* 402 U.S. 33; *United States* v. *Scotland Neck Board of Education, supra,* 407 U.S. at 491 (Burger, C.J., concurring).

from the operation of others of the 148 private, segregated schools as to which the plaintiffs sought relief. Effective desegregation of the public schools in those school districts has been wholly frustrated by the formation and continued operation of such private schools. State aid, such as the provision of textbooks, which supports the educational functions of those institutions to any substantial degree and thus contributes to the continuation of dual school systems in these districts is inconsistent with the State's responsibilities as defined in *Green*. Accordingly, at least to the extent that the appellees have provided state-owned textbooks for the use of students attending such private schools, their action should be enjoined. However, for reasons stated in Point II, *supra*, we believe that the broader relief sought by appellants is also warranted on the facts of this case.[30]

[30] That relief would not, of course, apply to schools which demonstrate that their existence does not perpetuate dualism, and that in all respects they operate on a racially nondiscriminatory, integrated basis.

Supreme Court, U
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MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-77

DELORES NORWOOD, *et al.*,

Appellants,

v.

D. L. HARRISON, SR., *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

APPELLANTS' REPLY BRIEF

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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APPELLANTS' REPLY BRIEF

1. Appellees assert that our references to "target" school districts to illustrate a network of private segregationist academies is inconsistent with the district court's finding that 90% of the State's educable children remain in public schools. (Appellees' Brief, p. 2.)

In fact, the district court's reference to "90% of the state's educable children" (*Norwood* v. *Harrison*, 340 F. Supp. 1003, 1013 (N.D. Miss. 1972)), is misleading. That statistic counts black and white students attending public schools and therefore provides little insight into the extent of white exodus from public schools. Moreover, the statewide statistic includes districts which are majority or overwhelmingly white in student enrollment and which therefore experienced negligible white resistance to public school desegregation. An examination of enrollment statistics for

the 33 majority white districts desegregating "voluntarily" under HEW supervision shows that white enrollment *increased* by 5,500 students, or by 7% from 1968-69 to 1970-71. In contrast, the 56 majority black school districts of the State filing enrollment reports with HEW experienced a loss of 30,000 white students, or 40% of their total white enrollment, between 1968-69 and 1970-71. (Henderson Deposition, Exhibit 10, *Number of Students by Race in Mississippi School Districts Based Upon Reports Submitted by School Districts to HEW;* Exhibit 11, *Mississippi Public School Districts Presently Desegregating Under HEW Guidelines and Without Court Order.*[1]

2. The State—as it has done in all previous cases of this kind—disputes the charge that the segregated academies of the State are "segregationist" and refers to the testimony of private school superintendents that their institutions were formed to provide "quality education" and have "open enrollment" policies. (Appellees' Brief, p. 2.)

This question of fact has been resolved against the State by every trial court faced with the issue of state aid to Mississippi academies. In *Coffey* v. *State Educational Finance Commission,* 296 F. Supp. 1389, 1392 (S.D. Miss. 1969), the court refers to the network of academies as a "system of private schools operated on a racially segregated basis as an alternative available to white students seeking to avoid desegregated public schools." In *Coffey II,* the same three-judge district court held that Mississippi's second tuition grant statute, enacted in September, 1969, was an attempt "to provide state assistance to students who leave newly integrated public schools to attend private

[1] Appellants are proceeding in *forma pauperis* and, in accordance with instructions received from the Clerk, none of the 104 depositions included in the record are reproduced in the Appendix.

schools." *Coffey* v. *State Educational Finance Commission*, Civil No. 3006 (S.D. Miss., September 2, 1970) (unreported). In *Green* v. *Kennedy*, 309 F. Supp. 1127, 1134 (D. D.C. 1970), the academies are described as having "been established in Mississippi for the purpose of avoiding the result of a unitary, non-racial public school system required by the Federal court decisions outlawing segregation in public schools, and in an attempt to maintain a broad pattern of racial segregation in the school system." And in the instant case the district court has referred to the academies as having "been formed throughout the state since the inception of public school desegregation." *Norwood, supra*, 340 F. Supp. at 1011.

Judge Wisdom has characterized the testimony of Louisiana private school personnel that their academies have "open enrollment" policies as "incredible"; such policies would come as "a surprise and shock to the parents who have children attending these schools." *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833, 848 (E.D. La. 1967). Judge Goldberg thinks that judges would have to be "more naively unsophisticated than this job allows" to accept such testimony. *Wright* v. *City of Brighton, Ala.*, 441 F.2d 447, 453 (5th Cir. 1971). The district courts have uniformly recognized that the state's argument is a "disingenuous quibble . . . resting on the assumption that federal judges are more naive than ordinary men." *United States* v. *City of Jackson*, 318 F.2d 1, 5 (5th Cir. 1963).

3. Appellees, without citation to the record, assert that "many" of the academies operate in new facilities and "virtually none" use former public school properties. (Appellees' Brief, p. 2.)

The record shows that of the 52 academies for which information is available only 4 operate in newly constructed

facilities designed to house an educational program. Forty-eight of the 52 schools operate in abandoned public school buildings or private homes or church facilities. (A. 44-49).

Respectfully submitted,

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NORWOOD ET AL. *v.* HARRISON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

No. 72-77. Argued February 21, 1973—Decided June 25, 1973

A three-judge District Court sustained the validity of a Mississippi statutory program, begun in 1940, under which textbooks are purchased by the State and lent to students in both public and private schools, without reference to whether any participating private school has racially discriminatory policies. The number of private secular schools in Mississippi, with a virtually all-white student population, has greatly increased in recent years. *Held:*

1. Private schools have the right to exist and to operate, *Pierce* v. *Society of Sisters*, 268 U. S. 510, but the State is not required by the Equal Protection Clause to provide assistance to private schools equivalent to that it provides to public schools without regard to whether the private schools discriminate on racial grounds. Pp. 6–7.

2. Free textbooks, like tuition grants directed to students in private schools, are a form of tangible financial assistance benefiting the schools themselves, and the State's constitutional obligation requires it to avoid not only operating the old dual system of racially segregated schools but also providing tangible aid to schools that practice racial or other invidious discrimination. Pp. 7–12.

3. Assistance carefully limited so as to avoid the prohibitions of the "effect" and "entanglement" tests may be confined to the secular functions of sectarian schools and does not substantially promote the religious mission of those schools in violation of the Establishment Clause. In this case, however, the legitimate educational function of private discriminatory schools cannot be isolated from their alleged discriminatory practices; discriminatory treatment exerts a pervasive influence on the entire educational process. *Brown* v. *Board of Education*, 347 U. S. 483. The Establishment Clause permits a greater degree of state assistance to sectarian

schools than may be given to private schools which engage in discriminatory practices. *Everson* v. *Board of Education*, 330 U. S. 1, and *Board of Education* v. *Allen*, 392 U. S. 236, distinguished. Pp. 12–14.

4. Proper injunctive relief can be granted without implying that all the private schools alleged to be receiving textbook aid have restrictive admission policies. The District Court can direct appellees to submit for approval a certification procedure whereby schools may apply for textbooks on behalf of pupils, affirmatively declaring admission policies and practices, and stating the number of their racially and religiously identifiable minority students, and other relevant data. Certification of eligibility will be subject to judicial review. Pp. 14–16.

340 F. Supp. 1003, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS and BRENNAN, JJ., concurred in the result.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72–77

Delores Norwood et al., Appellants, v. D. L. Harrison, Sr., et al. | On Appeal from the United States District Court for the Northern District of Mississippi.

[June 25, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

A three-judge District Court sustained the validity of a Mississippi statutory program under which textbooks are purchased by the State and lent to students in both public and private schools, without reference to whether any participating private school has racially discriminatory policies. *Norwood* v. *Harrison*, 340 F. Supp. 1003 (ND Miss. 1972). We noted probable jurisdiction, 410 U. S. —.

I

Appellants, who are parents of four school children in Tunica County, Mississippi, filed a class action on behalf of students throughout Mississippi to enjoin in part the enforcement of the Mississippi textbook lending program. The complaint alleged that certain of the private schools excluded students on the basis of race and that, by supplying textbooks to students attending such private schools, appellees, acting for the State, have provided direct state aid to racially segregated education. It was also alleged that the textbook aid program thereby impeded the process of fully desegregating public schools, in violation of appellants' constitutional rights.

Private schools in Mississippi have experienced a marked growth in recent years. As recently as the 1963–1964 school year, there were only 17 private schools other than Catholic schools; the total enrollment was 2,362 students. 916 students in these nonpublic schools were Negro, and 192 of these were enrolled in special schools for retarded, orphaned, or abandoned children.[1] By September of 1970, the number of private non-Catholic schools had increased to 155 with a student population estimated at 42,000, virtually all white. Appellees do not challenge the statement, which is fully documented in appellants' brief, that "the creation and enlargement of these [private] academies occurred simultaneously with major events in the desegregation of public schools . . . ."[2]

This case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race or religion or of the authority of a State to allow such schools. See *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). The narrow issue before us, rather, is a particular form of tangible assistance the State provides to students in private schools in common with all other students by lending textbooks under the State's 33-year-old program for providing free textbooks to all the children of the State. The program dates back to a 1940 appeal for improved education facilities by the Governor of Mississippi to the state legislature. The legislature then established a state textbook purchasing board and authorized it to select, purchase, and distribute free textbooks for all school children through the first eight grades.[3] In 1942, the program was extended to

[1] Joint Appendix, at 40–41.

[2] Appellants' Brief, at 8–9.

[3] See *Norwood* v. *Harrison*, *supra*, 340 F. Supp., at 1007.

cover all high school students, and, as codified, the statutory authorization remains substantially unchanged. § 6634 *et seq.*, Miss. Code of 1942.

Administration of the textbook program is vested in the Mississippi Textbook Purchasing Board, whose members include the Governor, the State Superintendent of Education, and three experienced educators appointed by the Governor for four-year terms. §§ 6634, 6641. The Board employs a full-time administrator as its Executive Secretary. Textbooks may be purchased only "for use in those courses set up in the state course of study adopted by the State Board of Education, or courses established by special acts of the legislature." § 6646. For each course of study, there is a "rating committee" composed of appointed members, § 6641 (d), and only those books approved by the relevant rating committee may be purchased from publishers at a price "not higher than the lowest prices at which the same books are sold elsewhere in the United States." § 6646 (1).

The books are kept at a central book repository in Jackson. § 6641 (f). Appellees send to each school district, and, in recent years, to each private school [4] requisi-

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[4] The regulation for distribution of state-owned textbooks from 1940 through 1970 provided as follows:

"For the distribution of free textbooks the local control will be placed in the hands of the County Superintendent of Education. All requisitions for books shall be made through him and all shipments of books shall be invoiced through him. At his discretion he may set up certain regulations governing the distribution of books within the county, such regulations not to conflict with the regulations adopted by the State Textbooks Board or provisions of the Free Textbook Act."

This regulation was revised on October 14, 1970, to read as follows:

"*Public Schools.* The administration of the textbook program in the public schools shall be the responsibility of the administrative heads of the county units, consolidated districts, and municipal sep-

tion forms listing approved textbooks available from the State for free distribution to students. The local school district or the private school sends a requisition form to the Purchasing Board for approval by the Executive Secretary, who in turn forwards the approval form to the Jackson book repository where the order is routinely filled and the requested books shipped directly to the school district or the private school.

The District Court found that "34,000 students are presently receiving state-owned textbooks while attending 107 all-white, nonsectarian private schools which have been formed throughout the state since the inception of public school desegregation." 340 F. Supp., at 1005.[5] During the 1970–1971 school year, these schools held 173,424 books for which Mississippi paid $490,239. The annual expenditure for replacement or new texts is approximately $6 per pupil or a total of approximately $207,000 for the students enrolled in the participating private segregated academies, exclusive of mailing costs which are borne by the State as well.

In dismissing the complaint the District Court stressed, first, that the statutory scheme was not motivated by a

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arate districts set up by the Legislature. All textbooks transactions between the public schools and the State shall be carried on through them. It shall be the duty of these local custodians to render all reports required by the State; to place orders for textbooks for the pupils in their schools; . . .

"*Private Schools.* Private and parochial school programs shall be the responsibility of the State Textbook Board. All textbook transactions will be carried out between the Board and the administrative heads of these schools. Their duties shall be the same as outlined above for public schools."

[5] The variation in the figures as to schools and students is accounted for by the District Court's omission of particular kinds of schools in making the findings. The earlier and higher figures are found in the briefs and are not disputed.

desire to further racial segregation in the public schools, having been enacted first in 1940, long before this Court's decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), and consequently, long before there was any occasion to have a policy or reason to foster the development of racially segregated private academies. Second, the District Court took note that providing textbooks to private *sectarian* schools had been approved by this Court in *Board of Education* v. *Allen*, 392 U. S. 236 (1968), and that "the essential inquiry, therefore, is whether we should apply a more stringent standard for determining what constitutes state aid to a school in the context of the Fourteenth Amendment's ban against denial of equal protection that the Supreme Court has applied in the First Amendment cases." The District Court held no more stringent standard should apply on the facts of this case, since, as in *Allen*, the books were provided to the students and not to the schools. Finally, the District Court concluded that the textbook loans did not interfere with or impede the State's acknowledged duty to establish a unitary school system under this Court's holding in *Green* v. *County School Board*, 391 U. S. 431, 437 (1968), since

> "Depriving any segment of school children of state-owned textbooks at this point in time is not necessary for the establishment of maintenance of state-wide unitary schools. Indeed, the public schools which plaintiffs acknowledge were fully established as unitary schools no later than 1970–71 continue to attract 90% of the state's educable children. There is no showing that any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools."

II

In *Pierce* v. *Society of Sisters*, *supra*, the Court held that a State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice. In the 1971 Term we reaffirmed the vitality of *Pierce*, *Wisconsin* v. *Yoder*, 406 U. S. 205, 213 (1972), and there has been no suggestion in the present case that we alter our view of *Pierce*. Yet the Court's holding in *Pierce* is not without limits. As MR. JUSTICE WHITE observed in his concurring opinion in *Yoder*, *Pierce* "held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools." 406 U. S., at 239.

Appellees fail to recognize the limited scope of *Pierce* when they urge that the right of parents to send their children to private schools under that holding is at stake in this case. The suggestion is made that the rights of parents under *Pierce* would be undermined were the lending of free textbooks denied to those who attend private schools—in other words, that school children who attend private schools might be deprived of the equal protection of the laws were they invidiously classified under the state textbook loan program simply because their parents had exercised the constitutionally protected choice to send the children to private schools.

We do not see the issue in appellees' terms. In *Pierce*, the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of

the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.

The appellees intimate that the State *must* provide assistance to private schools equivalent to that it provides to public schools without regard to whether the private schools discriminate on racial grounds. Clearly, the State need not. Even as to church-sponsored schools whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). The Religion Clauses of the First Amendment strictly confine state aid to sectarian education. Even assuming, therefore, that the Equal Protection Clauses might require state aid to be granted to private nonsectarian schools in some circumstances—health care or textbooks, for example—a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance. See *San Antonio Independent School District* v. *Rodriguez*, — U. S. — (1973). In the same way, a State's special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools without regard to constitutionally mandated standards forbidding state-supported discrimination. That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.

III

The District Court's holding therefore raises the question whether and on what terms a State may—as a matter of legislative policy—provide tangible assistance to students attending private schools. Appellants assert not

only that the private schools are in fact racially discriminatory, but also that aid to them in any form is in derogation of the State's obligation not to support discrimination in education.

This Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools.[6] A textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by the prior cases. Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves.[7] An inescap-

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[6] *Brown* v. *South Carolina Board of Education*, 296 F. Supp. 199 (SC 1968), aff'd *per curiam*, 393 U. S. 222 (1968); *Poindexter* v. *Louisiana Finance Commission*, 275 F. Supp. 833 (ED La. 1967), aff'd *per curiam*, 389 U. S. 571 (1968). See *Wallace* v. *United States*, 389 U. S. 215 (1967), aff'g *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458, 475 (MD Ala. 1967). Mississippi's tuition grant programs were invalidated in *Coffey and United States* v. *State Educational Finance Commission*, 296 F. Supp. 1380 (SD Miss.); *Coffey and United States* v. *State Educational Finance Commission*, SD Miss., CA No. 2906, decided Sept. 2, 1970 (unreported). *Coffey II* involved a statute which provided for tuition loans rather than tuition grants.

See *Green* v. *Connally*, 303 F. Supp. 1150, aff'd *sub nom. Coit* v. *Green*, 404 U. S. 602.

[7] Appellees misperceive the "child benefit" theory of our cases decided under the Religion Clauses of the First Amendment. See, *e. g.*, *Cochran* v. *Louisiana State Board of Education*, *supra*, and *Board of Education* v. *Allen*, *supra*. In those cases the Court observed that the direct financial benefit of textbooks loans to students is "to parents and children, not to schools," *Allen*, *supra*, 392 U. S., at 244, in the sense that parents and children—not schools—would in most instances be required to procure their textbooks if the State did not. But the Court has never denied that "free books make it more likely that some children choose to attend a sectarian school," *ibid.*, just as in other cases involving aid to sectarian schools we have acknowledged that the various forms of state assistance "surely aid those [religious] institutions . . . in the sense that religious bodies

able educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination. Racial discrimination in state-operated schools is barred by the Constitution and "[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Lee* v. *Macon County*, 267 F. Supp. 458, 475 (MD Ala. 1967).

We do not suggest that a State violates its constitutional duty merely because it has provided *any* form of state service that benefits private schools said to be racially discriminatory. Textbooks are a basic educational tool and, like tuition grants, they are provided only in connection with schools; they are to be distinguished

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would otherwise have been forced to find other sources from which to finance these services." *Tilton* v. *Richardson*, 403 U. S. 672, 679. Plainly, religion benefits indirectly from governmental aid to parents and children; nevertheless, "[t]hat religion may indirectly benefit from governmental aid . . . does not convert that aid into an impermissible establishment of religion." *Lemon* v. *Kurtzman*, 403 U. S. 602, 664 (1971) (opinion of WHITE, J.).

The leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools. "State support of segregated schools through any arrangement, management, funds or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Cooper* v. *Aaron*, 358 U. S. 1, 19. Thus MR. JUSTICE WHITE, the author of the Court's opinion in *Allen*, *supra*, and a dissenter in *Lemon* v. *Kurtzman*, noted there that in his view, legislation providing assistance to any sectarian school which restricted entry on racial or religious grounds would to that extent be unconstitutional. 403 U. S., at 671, n. 2. See Part IV, *infra*.

from generalized services government might provide to schools in common with others. Moreover, the textbooks provided to private school students by the State in this case are a form of assistance readily available from sources entirely independent of the State—unlike, for example, "such necessities of life as electricity, water, and police and fire protection." *Moose Lodge No. 107 v. Irvis*, 403 U. S. 163, 173 (1972). The State has neither an absolute nor operating monopoly on the procurement of school textbooks; anyone can purchase them on the open market.

The District Court laid great stress on the absence of showing by appellants that "any child enrolled in private school if deprived of free textbooks would withdraw from private schools and subsequently enroll in the public schools." We can accept this factual assertion; we cannot and do not know, on this record at least, whether state textbook assistance is the determinative factor in the enrollment of any students in any of the private schools in Mississippi. We do not agree with the District Court in its analysis of the legal consequences of this uncertainty, for the Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school. A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination. "[D]ecisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 per cent or adds up to only 49 per cent of the support of the segregated institution." *Poindexter v. Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833, 854 (1967).[8]

[8] Accord, *Griffin v. State Board of Education*, 296 F. Supp. 1178, 1181 (ED Va. 1969); *Brown v. South Carolina Board of Education*,

The recurring theme of appellees' argument is a sympathetic one—that the State's textbook loan program is extended to students who attend racially segregated private schools only because the State sincerely wishes to foster quality education for all Mississippi children, and, to that end, has taken steps to insure that no sub-group of school children will be deprived of an important educational tool merely because their parents have chosen to enroll them in segregated private schools. We need not assume that the State's textbook aid to private schools has been motivated by other than a sincere interest in the educational welfare of all Mississippi children. But good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect." *Wright* v. *Council of City of Emporia*, 407 U. S. 451, 462 (1972). The Equal Protection Clause would be a sterile promise if state involvement in possible private activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal.

The District Court offered as further support for its holding the finding that Mississippi's public schools "were fully established as unitary schools throughout the state no later than 1970–71 [and] continue to attract 90% of the state's educable children." 340 F. Supp., at 1013. We note, however, that overall statewide attendance figures do not fully and accurately reflect the impact of private schools in particular school districts.[9] In any event, the constitutional infirmity of

296 F. Supp. 203 (SC 1968). Contra, *Griffin* v. *State Board of Education*, 239 F. Supp. 560 (ED Va. 1965) (superseded).

[9] In Tunica County, for example, where appellants reside, in response to *Green*, *supra*, and *Alexander* v. *Holmes County Bd. of Ed.*, 396 U. S. 19 (1969), all white children were withdrawn from public schools and placed in a private academy housed in local church

the Mississippi textbook program is that it significantly aids the organization and continuation of a separate system of private schools which, under the District Court holding, may discriminate if they so desire. A State's constitutional obligation requires it to steer clear not only of operating the old dual system of racially segregated schools but also of giving significant aid to institutions that practice racial or other invidious discrimination. That the State's public schools are now fully unitary, as the District Court found, is irrelevant.

IV

Appellees and the District Court also placed great reliance on our decisions in *Everson* v. *Board of Education*, 330 U. S. 1, and *Board of Education* v. *Allen*, 392 U. S. 236. In *Everson*, we held that the Establishment Clause of the First Amendment did not prohibit New Jersey from "spending tax-raised funds to pay the bus fares of parochial school pupils as part of a general program under which it pays the fares of pupils attending public and other schools." 330 U. S., at 17. *Allen*, following *Everson*, sustained a New York law requiring school textbooks to be lent free of charge to all students, including those in attendance at parochial schools, in specified grades.

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facilities and staffed by the principal and 17 high school teachers of the county system, who resigned in mid-year to accept jobs at the new academy. See *United States* v. *Tunica County Bd. of Ed.*, 327 F. Supp. 1019 (ND Miss. 1970), aff'd, 440 F. 2d 337 (CA5 1971). As of the time of the filing of this lawsuit, the successor Tunica Institute of Learning enrolled 495 students, all white, and would not attest to an open enrollment policy. Similar histories of Holmes County, Canton Municipal Separate School District, Jackson Municipal Separate School District, Amite County, Indianola Municipal Separate School District, and Grenada Municipal Separate School District are recited, without challenge by appellees, in Appellants' Brief, at pp. 14–19.

Neither *Allen* nor *Everson* is dispositive of the issue before us in this case. Religious schools "pursue two goals, religious instruction and secular education." *Board of Education* v. *Allen, supra,* 392 U. S., at 245. And, where carefully limited so as to avoid the prohibitions of the "effect" and "entanglement" tests, States may assist church-related schools in performing their secular functions, *Committee for Public Education* v. *Nyquist, post,* at 16–17; *Levitt* v. *Committee for Public Education, post,* at ——, not only because the States have a substantial interest in the quality of education being provided by private schools, see *Cochran* v. *Louisiana State Board of Education, supra,* 281 U. S., at 375, but more importantly because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others.

Like a sectarian school, a private school—even one that discriminates—fulfills an important educational function; however, the difference is that in the context of this case the legitimate educational function cannot be isolated from discriminatory practices—if such in fact exist. Under *Brown* v. *Board of Education, supra,* discriminatory treatment exerts a pervasive influence on the entire educational process. The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education. There is no reason to discriminate against students for reasons wholly unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be communicated to the students who are admitted. Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but

neither can it call on the Constitution for material aid from the State.

Our decisions under the Establishment Clause reflect the "internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause," *Tilton* v. *Richardson*, 403 U. S. 672, 677. This does not mean, as we have already suggested, that a State is constitutionally obligated to provide even "neutral" services to sectarian schools. But the transcendent value of free religious exercise in our constitutional scheme leaves room for "play in the joints" to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors.

In contrast, although the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts.[10] However narrow may be the channel of permissible state aid to sectarian schools, *Nyquist*, *supra*; *Levitt*, *supra*, it permits a greater degree of state assistance than may be given to private schools which engage in discriminatory

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[10] See, *e. g.*, *Griffin* v. *Breckinridge*, 403 U. S. 88; *Jones* v. *Alfred H. Mayer Co.*, 393 U. S. 409; 42 U. S. C. § 2000a *et seq.* (barring discrimination in public accommodations); 42 U. S. C. § 2000e *et seq.* (barring discrimination in private employment); 42 U. S. C. § 3601 *et seq.* (barring discrimination in private housing transactions).

practices that would be unlawful in a public school system.

V

At oral argument, appellees expressed concern over the process of determining the scope of relief to be granted should appellants prevail on the merits. That aspect of the case presents problems but the procedural details need not be fully resolved here. The District Court assumption that textbook loans were permissible, even to racially discriminating private schools, obviated any necessity for that court to determine whether some of the private schools could properly be classified as "racially discriminatory" and how that determination might best be made. We construe the complaint as contemplating an individual determination as to each private school in Mississippi whose students now receive textbooks under the State's textbook loan program; relief on an assumption that all private schools were discriminating thus foreclosing individualized consideration would not be appropriate.

The proper injunctive relief can be granted without implying a finding that all the private schools alleged to be receiving textbooks aid are in fact practicing restrictive admission policies. Private schools are not fungible and the fact that some or even most may practice discrimination does not warrant blanket condemnation. The District Court can appropriately direct the respondents to submit for approval a certification procedure under which any school seeking textbooks for its pupils may apply for participation on behalf of pupils. The certification by the school to the Mississippi Textbook Purchasing Board should, among other factors, affirmatively declare its admission policies and practices, state the number of its racially and religiously identifiable minority students and such other relevant data as is consistent with this opinion. The State's

certification of eligibility would, of course, be subject to judicial review.

This school by school determination may be cumbersome but no more so than the State's process of ascertaining compliance with educational standards. No presumptions flow from mere allegations; no one can be required, consistent with due process, to prove the absence of violation of law.

The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN concur in the result.